SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 1 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1411

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners,

Consolidated With

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

JOHN PRZYWARA, ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

JOHN B. MURNIGHAN,
GREEN, MURNIGHAN & KANE ASSOCIATES,
228 North La Salle Street,
Chicago, Illinois 60601,
ST 2-0293,
Attorney for Petitioners, National Bank of Albany Park in Chicago, as Trustee Under Trust No. 11-1030, Individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee Under Trust No. 15166; and La Salle National Bank of Chicago, as Trustee Under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, His Wife.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX TO APPENDIX.

PAGE

Appellate Court of Illinois

Opinion in No. 51710 ..... A2

Opinion in No. 54685 ..... A6

Illinois Statutes

Eminent Domain Act §§ 1, 2 ..... A29

Eminent Domain Act § 11 ..... A31

School Code § 34-1, 34-2, 34-20 ..... A31

Judgment Order of Trial Court A33

Motion to Dismiss A32

Notice of Appeal A38

November 1962 Agreement A40

No. 51710

IN THE APPELLATE COURT OF ILLINOIS,

First District.

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Plaintiff-Appellee,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., et al.,
Defendants,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, as Trustee under Trust No. 11-1036, individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee under Trust No. 15166; and LASALLE NATIONAL BANK OF CHICAGO, as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife,
Defendants-Appellants,

Consolidated With

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Plaintiff-Appellee,

vs.

JOHN PRZYWARA, et al.,
Defendants,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, as Trustee under Trust No. 11-1030, individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee under Trust No. 15166; and LASALLE NATIONAL BANK OF CHICAGO, as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife,
Defendants-Appellants.

Appeal from the Circuit Court of Cook County.

Honorable Charles J. Dougherty, Judge Presiding.

Opinion of the Appellate Court—Case No. 51710.

MR. JUSTICE DRUCKER Delivered the Opinion of the Court.

Petitioner instituted condemnation proceedings on March 4, 1965 (Circuit Court No. 65 L 7227) for five parcels of land. On July 14, 1965, another petition was filed in the same case seeking nine and one-half acres of unsubdivided land and one acre of subdivided property which consisted of eight lots designated as Parcel E or Parcel 4. On July 14, 1965, another petition was filed in a new case (Circuit Court No. 65 L 20763) seeking the same property. In that case a change of venue was granted November 3, 1965, as to Parcel E and the case reassigned for separate trial as to Parcel E. Thereafter the cases were consolidated.

The instant case involved Parcels A, B, C and D. Petitioner has appealed the jury's awards. Defendants Stanley and Irene Rusek, owners of Parcel A, have asked us to affirm the judgment relating to Parcel A. Petitioner has also indicated its willingness to affirm this portion of the judgment and we affirm the judgment as to Parcel A.

Defendants John and Josephine Przywara, National Bank of Albany Park and Exchange National Bank of Chicago have taken cross-appeals from the denial of their traverses and motions to dismiss and have also appealed the jury's awards as to Parcels B, C and D. In their cross-appeals defendants argued that they were denied a hearing on their traverses and motions to dismiss the petitioner's complaint. Defendant National Bank of Albany Park filed a traverse and motion to dismiss simultaneously with its first appearance in the case on February 9, 1966. It alleged that petitioner had failed to satisfy certain statutory preconditions to the institution of condemnation proceedings and also alleged certain facts which it claimed made this taking illegal as an abuse of govern-

mental discretion. On February 11 petitioner's motion to strike National Bank of Albany Park's motion to dismiss was filed and granted. The motion to strike stated:

> Said defendant's traverse filed without leave of Court eleven and one-half months after condemnation proceedings were instituted and said defendant was served with summons and one month after this Court denied identical traverse in this cause filed by the same attorneys is an improper attempt to have this Court try the same question over and over again contrary to the well established law in Illinois.

The Exchange National Bank sought leave to file a similar traverse and motion to dismiss on February 10, 1966, but leave was denied it on the same day. No reason for denying leave appears in the record.

The general rule for filing motions to dismiss is stated in *Board of Education* v. *City of Chicago,* 402 Ill. 291, at page 298:

> It is also contended by appellee that before appellant is entitled to relief in eminent domain proceedings, a hearing must be had on its motion to dismiss and traverse. This court has held that such procedure is the proper method of reaching and deciding the issues as to the right of a petitioner to have condemnation in a particular case. The only issue to be tried by the jury is the amount of compensation to be awarded. A defendant has a right to contest the petitioner's right to condemn, which he may do by motion to dismiss, and having done so the burden is on the petitioner to maintain its right by proper proof.

Petitioner, however, argues here and in its motion to strike that the instant case is controlled by *Chicago Land Clearance Commission* v. *Rosenau,* 10 Ill. 2d 501. In that case condemnation proceedings were instituted on April 2, 1953, and defendant appeared through counsel on May 14, 1953. On January 26, 1954, the trial judge ordered that all parties who wished to contest petitioner's right to condemn do so

within seven days. Defendant's lawyer informed the court that it did not wish to do so. On June 13, 1955, more than two years after the initiation of the proceedings, defendant changed its position and sought to contest the condemnation. The Supreme Court upheld the trial court's denial of leave to file a traverse based on failure to comply with the deadline of the order issued on January 26, 1954, saying at page 506:

> If all defendants in a condemnation proceeding are required to file their traverses or motions to dismiss within a specified time, then the trial court can control its calendar and try all those traverses which raise the same question and dispose of them on one hearing. On the other hand, if each defendant is to have the right to file his traverse or motion to dismiss whenever he sees fit to do so, then the trial court will be obliged to try the very same question over and over again. This would compound the evils that the crowded court calendars in Cook County already present.

The petition in the instant case was filed on March 4, 1965; an additional petition enlarging the area sought to be taken was filed in July 1965. No further action was taken by petitioner until January 27, 1966, when petitioner moved to consolidate the cases and they were ordered removed from the calendar. The record does not disclose that a trial date was set. (Appellee claims that February 21 was set as the trial date.) On February 9 National Bank of Albany Park filed its appearance and motion to dismiss. On February 10 Exchange National Bank of Chicago, as Trustee, filed its motion for leave to file its motion to dismiss. No order setting a deadline for filing traverses was ever sought or entered. We cannot find that defendants' rights to contest petitioner's right to condemn should have been denied under these circumstances. *Rosenau* is clearly distinguishable on the facts.

Petitioner, however, points out that the parties in this

case sought to file traverses and motions to dismiss identical to that denied in the proceeding as to Parcel E. (Parcel E was tried separately by a different trial judge following the granting of a change of venue.) Petitioner argues that since the same lawyers represented the owners of Parcel E as well as the parties who filed the motions to dismiss and the traverses in this case and the motions to dismiss alleged identical grounds, the parties in the instant case are barred by the decision reached by the judge in the proceedings as to Parcel E one month before their own motions were filed. We know of no "well established law in Illinois" which prevents owners of property from challenging the condemnor's right to proceed simply because they make the same arguments through the same attorneys as were made by another party in a different suit tried by a different judge. Certainly the fact that different properties and different parties were involved prevents the application of the principle of *res adjudicata.* We believe that defendants were entitled to a hearing on the petitioner's right to condemn. Therefore the judgments as to Parcels B, C and D are reversed and the cause remanded with directions to vacate the order striking the traverse and motion to dismiss of National Bank of Albany Park, to vacate the order denying leave to Exchange National Bank to file its traverse and motion to dismiss and to conduct such proceedings as may be required. *City of Kewanee* v. *Puskar,* 308 Ill. 167.

Both petitioner and defendant have asserted errors entitling them to a new trial on the questions relating to just compensation. In view of our decision we find it unnecessary to consider these alleged errors.

AFFIRMED AS TO PARCEL A.
REVERSED AND REMANDED WITH DIRECTIONS AS TO PARCELS B, C AND D.

McCORMICK, *P. J.*, and ENGLISH, *J.*, concur.

No. 54685

IN THE APPELLATE COURT OF ILLINOIS,

First District.

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Plaintiff-Appellee,
vs.
ALBERT J. SCHORSCH REALTY CO., INC., et al.,
Defendants,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, as Trustee under Trust No. 11-1030, individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee under Trust No. 15166; and LASALLE NATIONAL BANK OF CHICAGO, as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife,
Defendants-Appellants,

Consolidated With

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Plaintiff-Appellee,
vs.
JOHN PRZYWARA, et al.,
Defendants,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, as Trustee under Trust No. 11-1030, individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee under Trust No. 15166; and LASALLE NATIONAL BANK OF CHICAGO, as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife,
Defendants-Appellants.

Appeal from the Circuit Court of Cook County.

Honorable Edward J. Egan, Judge Presiding.

Opinion of the Appellate Court—Case No. 54685.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an eminent domain proceeding commenced in 1965 by the Board of Education of the City of Chicago to acquire for school purposes five parcels of land referred to as Parcels A, B, C, D and E. The instant appeal concerns Parcels B, C and D, which consist of approximately nine and one-half acres of vacant land except for an old frame house. These three parcels were the subject of a prior appeal in which this court reversed judgment in favor of plaintiff and remanded the cause "with directions to vacate the order striking the traverse and motion to dismiss of National Bank of Albany Park, to vacate the order denying leave to Exchange National Bank to file its traverse and motion to dismiss and conduct such proceedings as may be required." 95 Ill. App. 2d 258, 263.

The mandate of the Appellate Court in the prior appeal was filed in the trial court on October 22, 1968. On remand and after hearing evidence, the trial court (1) overruled and denied defendants' motions to dismiss; (2) denied leave to defendants to file a petition to establish a new date to fix the valuation of the property involved; and (3) denied leave to defendant National Bank of Albany Park to file a cross petition for damages to a remaining five-acre tract immediately north of and contiguous to Parcel D of these proceedings. In a valuation trial a jury verdict fixed the value of Parcel B at $165,000, C at $92,000 and D at $92,000. Judgments were entered on the verdict.

Defendants appeal from orders striking portions of the motions to dismiss, overruling and denying the motions to dismiss, denying leave to file certain petitions, and from

the verdict and judgments entered thereon. On appeal defendants contend they did not receive a proper hearing on their motions which were either dismissed or denied. Also, because of prejudicial trial errors, they did not receive a fair valuation trial.

Initially considered is defendants' contention that the trial court erred in striking their motions to dismiss and violated their right to due process of law. The motions alleged the following:

> "1. Plaintiff failed to prepare any preliminary plans for the construction of a school or to decide on what type of school it would construct on the proposed site.
>
> 2. Plaintiff, prior to the initiation of the instant suit, began a prior suit seeking to condemn a site slightly less than three acres of land in the immediate vicinity which was subsequently dismissed. Plaintiff also had initiated a suit prior to this instant suit, seeking to condemn a site of approximately 19 acres, also in the immediate vicinity. This second suit also was dismissed by the plaintiff prior to beginning this suit. By reason of the premises the attempt to take herein demonstrates an attempt to take an excessive amount of property.
>
> 3. No reports, surveys, or other basis for a recommendation for the taking, or reason why plaintiff should proceed differently in this suit from its proceedings in the two suits heretofore referred to, appear anywhere of record.
>
> 4. Plaintiff has failed to comply with an essential condition precedent to the filing of its Petition herein in that it has failed to comply with the provisions of Section 11-12-4 of Chapter 24 of the Illinois Statutes.
>
> 5. Since plaintiff relies on the exceptions contained in Section 42 of Chapter 102 of the Illinois Revised Statutes relating to Meetings of Public Agencies to keep from the record any information which enters into its purported exercise of discretion to acquire the

real estate here involved, their failure to comply with the duties of the statute requiring their reference to the Chicago Plan Commission constitutes an abuse of power and prevents any reasoned decision or check or balance on the administrative actions of the Board of Education as plaintiff herein. It further prevents any review which might serve to uncover issues which were ignored or inadequately treated by the Board of Education; and refuses to this defendant the constitutional and statutory protections intended by the Illinois Legislature in the Plan Commission Statute. As a result thereof, this defendant is deprived of due process in that there is a complete absence of any review of plaintiff's decision to take this property."

Thereafter, plaintiff filed a motion to strike the motions to dismiss on the ground that the motions were legally insufficient. On December 20, 1968, the trial court entered an order which included directions to plaintiff to respond to certain paragraphs of the provisions of defendants' Request to Admit Facts, which had been served on plaintiff on December 16, 1968. On January 3, 1969, and after a hearing, the court entered an order striking paragraphs 1, 3, 4 and 5 of defendants' motions. On January 6, 1969, the remaining portions of defendants' motions to dismiss were denied, after hearing the testimony of witnesses and considering various resolutions of the Board of Education relating to the acquisition, the responses to the Request to Admit Facts which related to the various sites involved, and arguments of counsel.

Defendants contend that the hearing on their motion to dismiss did not fulfill the minimal requirements of due process of law. Defendants argue that "plaintiff in seeking to condemn this property has failed to show any use of discretion in making its determination and additionally abused its discretion in taking an excessive amount of property." They assert that the reasoning of plaintiff's

motion to strike was that defendants had no right to inquire into plaintiff's basis for its exercise of eminent domain and that the attempts at discovery by defendants was inhibited by this position, especially as to the question of why the Board of Education changed at least the size of its site on five occasions.

Plaintiff contends that the selection and acquisition of the public school site here involved was within the discretion of the Board of Education. It asserts that it is a long established rule of condemnation law that the exercise of the power to condemn is a legislative and not a judicial question, and the determination by the Board of Education to acquire the subject school site should not be disturbed by the court.

After examining the arguments and authorities cited by both sides, we conclude that an extended discussion would unnecessarily lengthen this opinion. The guidelines to be used here are sufficiently set forth in *City of Chicago* v. *Vaccarro,* 408 Ill. 587, 97 N. E. 2d 766 (1951); *Cafeteria Workers* v. *McElroy,* 367 U. S. 886 (1961); and an article by Chief Justice Traynor of the California Supreme Court in 17 Vanderbilt Law Review 109.

In *City of Chicago* v. *Vaccarro,* it is stated (p. 596):

> "This court has held in an unbroken line of decisions that where the right to condemn exists, and the property is subject to the right of eminent domain and is being condemned for a public use, and the right to condemn is not being abused, courts cannot deny the right to condemn on the ground that the exercise of the power is unnecessary or not expedient, as the determination of that question devolves upon the legislative branch of the government and is a question which the judicial branch of the government cannot determine; and that in such cases courts may only rightfully determine whether a petitioner has the power to exercise the right of eminent domain, whether the

> property is subject to the right of eminent domain and is being taken for a public use, whether the power is being abused, as by the taking of an excessive amount of property, and other kindred questions which do not involve a determination of the necessity or expediency of the taking of the lands sought to be condemned."

And at page 597:

> "The general rule is that where the legislature has delegated to a corporation the authority to exercise the power of eminent domain, the corporation has also the authority to decide on the necessity for exercising the right, and its decision will be conclusive in the absence of a clear abuse of the power granted. * * * An abuse of such power, however, will not be tolerated, and if no necessity for its exercise exists, or if it appears that the quantity of the property sought to be taken is grossly in excess of the amount necessary for the public use, the court will not permit the land to be taken."

In *Cafeteria Workers* v. *McElroy,* it was stated (p. 895):

> "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required."

Justice Traynor in his article remarked (p. 117):

> "One is moved to add that these are basic concerns of a court in the review of decisions of administrative agencies. A person has not had a fair hearing if the one in authority, given discretion to adjudge the case in the ample terms of a general policy, has exercised

his discretionary power not with the realistic appropriateness that is the very justification of such power, but with such harsh inappropriateness as to mock the meaning of discretion. A court reviewing an alleged abuse of discretion, and finding a prima facie case of arbitrariness, must be alert to ascertain whether or not there emerges from the record some reasonable explanation for the administrative decision. We cannot take it for granted that because an authority is, he thinks. The thought process, or the absence thereof, of the one in authority has more than once been the key to determining the issue of due process in administrative proceedings."

Summarized, the motions to dismiss were substantially based on the following grounds: (1) preliminary plans for construction for a school or type of school were not made; (2) the taking was excessive; (3) no reports, surveys, or other basis why plaintiff should proceed in this suit differently than in the two suits it heretofore dismissed appear of record; (4) plaintiff did not consult with the Chicago Plan Commission; and (5) plaintiff has kept from the record information which entered into its exercise of discretion in seeking to acquire the school site.

After examining this record, we find that in the instant case the filing of the resolution of the Board of Education to acquire the subject property was sufficient. No plans, reports or surveys were required to be prepared as a condition precedent to plaintiff's exercise of the power to acquire a school site. See 26 Am. Jur. 2d, Eminent Domain, § 117; *Village of Depue* v. *Banschbach,* 273 Ill. 574, 113 N. E. 156 (1916). The dismissal of two previous suits by plaintiff was not relevant to the determination that the taking was excessive. Plaintiff was not required to consult with or secure the approval of the Chicago Plan Commission. We agree with the remarks of this

court in the first appeal of this cause (95 Ill. App. 2d 264, 279):

> "The statute expressly provides that the plan commission's disapproval does not bar the proposed action. We believe that the statute taken as a whole indicates that the requirement of submission to the plan commission is not mandatory and failure to submit the proposed action to the commission does not bar condemnation."

Furthermore, plaintiff was not required to reveal or record the information or motives that went into its decision. In *Oak Park National Bank* v. *Village of Broadview,* 27 Ill. 2d 151, 188 N. E. 2d 679 (1963), it is said (p. 155):

> "The motives that may have actuated those in authority are not the subject of judicial investigation."

In *Deerfield Park Dist.* v. *Development Corp.,* 22 Ill. 2d 132, 174 N. E. 2d 850 (1961), it is said (p. 140):

> "As we stated in *Ligare* v. *City of Chicago,* 139 Ill. 46, in a condemnation case the purpose for which the power of eminent domain is exercised may be questioned, but 'the motives that may have actuated those in authority are not the subject of judicial investigation.' "

Finally, the trial court did not err in refusing defendants leave to amend their motions to dismiss. Such was a matter for the sound discretion of the trial judge, and there is nothing in this record to show that he abused his discretion. We hold the trial court was correct in striking or denying defendants' motions to dismiss and in so doing defendants' right to due process of law was not violated.

Subsequent to the denial of the motions to dismiss, the court denied leave to defendants to file a petition alleging substantial change in the value of their property and asking

for a new valuation date. Also, the court denied leave to defendant National Bank of Albany Park to file a cross petition alleging damages to its five-acre parcel of property immediately north of and contiguous to Parcel D. The court then set the cause for a valuation trial as of the date of the filing of the condemnation petition in 1965.

At the valuation trial before a jury, the first witness for plaintiff was Charles A. Hodlmair. He had been in the real estate brokerage, sales, management, appraisal and construction business all his life, and was well acquainted with the area in question. He testified that the area of the subject parcels is mostly newly built up, particularly on the south and east, as a single family residential neighborhood, for which it is zoned and best suited.

Hodlmair further testified that the highest and best use of Parcels B, C and D as of July, 1965, was single family residence use. He based his opinion on the character and condition of the property itself, the size of the parcels, the surrounding neighborhood, the single family residence developments surrounding the subject property on three sides, the situation with respect to bringing in sewer and water, the necessary site preparation, the possible uses of the property, the mortgage market possibilities, and the most feasible layout of the lots on these parcels for subdivision purposes, including the development problem with Parcel B caused by the one-half acre taken out for Parcel A. Other difficulties in developing the condemned parcels for use arose from the fact that there was a one street access only, and that Cumberland Avenue at the west is a 40-mile an hour speed limit road. Also, for Parcel B it would be necessary to put in a street with a cul-de-sac or loop in order to get in and out, thereby reducing the amount of land for building use.

Hodlmair's valuation testimony was $85,000 for Parcel B and $58,000 each for Parcels C and D. In arriving at

these figures he took into account the sales price of comparable land known to him, the market, the cost of improving the land and the maximum that would be paid for it on the market after improvement. The vacant property across Cumberland didn't have any particular bearing on his opinion. When asked if he took into account whether there was a reasonable probability of rezoning these three parcels, he stated, "I wouldn't even consider it."

The second valuation witness for plaintiff was Herman O. Walther, who testified that he has been in the real estate business for forty years, and has appraised all kinds of real estate during that time. He testified that in his opinion the highest and best use of the subject parcels as of July 14, 1965, was for single family residence use in keeping with the adjoining developments, all single family residences, and with the zoning to the east, south and north of the property. He valued Parcel B at $125,000 and Parcels C and D at $70,000 each as of the date of July 14, 1965. The facts he took into consideration in arriving at these figures included the location of the property, the transportation, the 200 or so single family homes that adjoined on the northeast, east and south of the subject parcels, the single family zoning and the highest and best use of the subject property, its accessibility to churches, schools, shopping areas, transportation, and his familiarity with the real estate market and his experience in the real estate business.

On cross-examination he testified that it would be highly improbable that Parcels B, C and D could be rezoned. He stated that "assemblage" is a process so that small parcels are made into a larger parcel of land under one ownership, whether through purchase or option. He finally stated that the R-4 zoning across the street had no affect on the subject property.

The third valuation witness for plaintiff was John J.

McNamara, who testified that he has been in the real estate business as a broker and an appraiser for forty-two years. He stated he was familiar with real estate in the vicinity of the subject parcels; that temporary classrooms have been erected south of the subject property at Cumberland and Balmoral, and that the subject parcels were on the east surrounded by a residential development of single family dwellings. He testified that in his opinion the highest and best use of Parcels B, C and D, as of July 14, 1965, would be for development as a single family residential development, based on property that these parcels are surrounded by and that the subject parcels are zoned R-2, single family residence. His opinion of value for Parcel B was $105,000 and $72,000 each for Parcels C and D. In arriving at these figures the elements he considered included the size and shape of the parcels, the use to which they could be put under their present zoning of R-2, and his experience in the real estate business. On cross-examination he testified that he did not take into account the reasonable probability of rezoning the subject parcels because they were strictly R-2 zoning.

Mitchell Kobelinski, a witness for defendants, testified that he was a lawyer and banker and has had extensive experience in assemblage and development of real estate of all types. He identified defendants' Exhibit 1 as a zoning map of the City of Chicago and testified that no rezonings occurred in the area of the subject parcels for the period July 14, 1965, to February 16, 1966, the date of the document. As of July 14, 1965, he owned Parcel C, had an option to purchase Parcel D and owned a five-acre parcel immediately north of D. He had an opinion that the parcels each would be best used for multi-family residential use with the possibility of alternate commercial use along the Cumberland Avenue frontage, and that the value of Parcel B at its highest and best use was between $340,000

and $365,000 and Parcels C and D at their highest and best use was $195,000 to $200,000. His opinion of the values of the subject parcels at their present zoning was $290,000 for Parcel B, and for Parcels C and D each $160,000 to $165,000. The factors he took into account in arriving at his opinions of value included rezoning and a demand for multi-family housing.

On cross-examination Kobelinski testified that he has had an interest in the neighborhood since 1962 when they first bought property there. He was asked what he paid for the five-acre tract immediately north of and contguous to Parcel D, which was objected to. Over this objection he testified that he paid $164,000. On redirect he testified that he did not seek rezoning of Parcel C or the five acres north prior to July 14, 1965, because at that time the last parcel of their assemblage had not been acquired. It was not economically advantageous.

Carl Gardner, a city planning consultant, testified for defendants. He stated that he was familiar with the subject property, and told specifically which areas of influence affected it. He described the established trend in the area toward multiple-family 6, 8 and 12 units and stated that Cumberland Avenue is in no way a zoning barrier. He stated the properties on either side of a given street should be the same use or a comparable use, at least a compatible use. He further stated that assuming that Parcels C and D were assembled with the five-acre tract immediately north, that his opinion of the highest and best use for that site would be a planned residential development under the zoning classification R-4. He also stated that the highest and best use of Parcel B would be the same.

Richard Roppolo testified for defendant that he was a real estate broker and was familiar with the subject property. He was asked to make an appraisal of Parcels B,

C and D, and his opinion was that the highest and best use of the property was a combination of commercial and multiple. He valued Parcel B at its highest and best use as $460,000 for what might be commercial and $300,000 for the multiple. His opinion of Parcels C and D at their highest and best use was $250,000. The values of the parcels at their present zoning of R-2 was $273,000 for Parcel B and $141,000 each for Parcels C and D.

Vincent Oliva testified for defendants as to the sale of allegedly similar property. The deal was closed and the money paid subsequent to July 14, 1965. However, upon objection by plaintiff, the court did not admit the sale into evidence.

Albert Schorsch, Jr., testified for defendants that he was a real estate broker and also a subdivider and builder. His opinion of the highest and best use of each of these parcels would be under general residence zoning, R-4, with apartment units. His opinion of the value of Parcel B at its highest and best use would be $351,200 and $202,000 for Parcels C and D at their highest and best uses. The value of the Parcels at their present zoning was $242,000 for Parcel B and $141,000 each for Parcels C and D. He took into account the upward trend of values of land which has put the market of the property beyond the reach of the single family home developer to a point where it would have to be developed as rental or general residence type property; and that the trend throughout the city has been toward the demand for more apartments.

On cross-examination he stated it would be necessary to get the zoning changed to use this property under R-4 and described the procedures for obtaining a rezoning.

Eugene Kuberski testified for defendants that he is a zoning plan examiner for the Cook County Building Department. He examined the five-acre tract of property in Nor-

wood Park Township at Cumberland Avenue immediately south of Bryn Mawr with regard to the number of residences a person could put on it. As of April, 1962, one residence could be placed on that parcel of property.

Defendants offered into evidence Exhibits 2 through 7, which were zoning ordinances of the City of Chicago relating to specific rezonings in the area covered by the zoning map. The court denied admission to Exhibits 2 through 6 inclusive and admitted Exhibit 7 into evidence. As previously noted, the jury returned a verdict awarding compensation and judgment was entered on the verdict.

Considered next is defendants' contention that they were not afforded a fair valuation trial because of prejudicial rulings of the trial court. They first complain that they were not allowed to present their theory of "assemblage" for the jury's consideration and that this evidence would have greatly shown an increase in value of the subject property. They note that if Parcels C and D were assembled with the five-acre tract near Parcel D, that compact nine-acre parcel would be worth more than the three smaller individual parcels. The record in this regard shows that in November, 1962, the owners of Parcels C and D, Walter and Florence Branda, entered into an option agreement where they gave Mitchell Kobelinski and Ted Szywala or their company an option right to purchase one-half of Parcel C on or before May 1, 1963; the other half of Parcel C on May 1, 1964; one-half of Parcel D on May 1, 1965, and the other half on May 1, 1966. At the time of the filing of the Petition to Condemn, the optionees had acquired the two halves of Parcel C but had not acquired any of Parcel D. The ownership of the parcels at the time of the filing was thus as follows: Parcel B was then owned by John and Josephine Przywara; Parcel C was then owned by the National Bank of Albany Park under Trust 11-1030, whose beneficiaries were Mitchell Kobelin-

ski and Ted Szywala or their company; and Parcel D was then owned by the Exchange National Bank under Trust No. 15166 as trustee, *whose beneficiaries were Walter and Florence Branda.* During the direct examination of Kobelinski, he was questioned concerning his ownership of property in the vicinity of the subject parcels. He testified that he owned Parcel C and "had an option" to purchase Parcel D. A colloquy took place and the witness stated: "I answered two questions, Judge. One I said we had an option to purchase Parcel D and we had title to the rectangle immediately north of Parcel D." The Court: "Okay, objection sustained as to 'had an option to purchase'."

Defendants assert that the trial judge struck the answer "had an option" in such a manner and so out of context that the jury readily may have understood it was to disregard any evidence by the defendants relating to the claim of an option throughout the trial, and that such was prejudicial. They assert that evidence of assemblage would tend to show a greatly increased market value. They also assert that Defendant's Instruction No. 8 concerning the theory of assemblage was improperly refused. Authorities cited include *County of Cook* v. *Holland*, 3 Ill. 2d 36, 119 N. E. 2d 760 (1954), and *Union Electric Power Co.* v. *Sauget*, 1 Ill. 2d 125, 115 N. E. 2d 246 (1953), where it was stated (p. 130):

> "As to the evidence, which must be viewed in the light that its purpose is to establish just compensation for the land, it has long been the rule that parties to a condemnation proceeding have the right to adopt their own theories as to the best and highest use of the land taken and each may introduce evidence without being bound by the theory of the other. * * * Since neither party is bound by the theory of the other, it follows that the court is not limited to admitting evidence which embraces the theory of one party only."

We find that *no prejudicial error was committed by the* trial court in its ruling. Kobelinski was asked the question, "Did you *own* any other real estate in the immediate vicinity of this property?" It was improper for the witness to answer that he *owned* Parcel D, because an option creates no interest in the land. See *Keogh* v. *Peck,* 316 Ill. 318, 328, 147 N. E. 266 (1925).

Also, we find that *defendants were not prevented from presenting their theory of assemblage to the jury.* The record shows that Kobelinski testified that he was part owner of the Ridgeway Construction Company, which owned Parcel C and had an option to purchase Parcel D. Also, defendants' witness Gardner, over objection, was allowed to testify as to the highest and best use of Parcels C and D as being assembled. Finally, it was *not prejudicial error to refuse Defendants' Instruction No. 8. There was no evidence that assemblage of Parcels C and D would affect the value of the parcels.*

Defendant National Bank of Albany Park, as Trustee for Kobelinski and Szywala, next contends that it was erroneously denied leave to file a cross petition and have damages to a remaining five acres immediately north of and contiguous to Parcel D assessed. Defendant bank owned this five-acre tract, but it was not a part of the condemnation proceedings. It notes that defendant National Bank of Albany Park established sufficient rights in the ownership of Parcel D which should have been sufficient to have damages assessed, presumably because it considered all of the parcels together, including the five acres north of Parcel D, more valuable as a single tract. Defendants maintain that they were diligent in attempting to assert their rights and at all times, when proper, asked the court to treat the property as a tract or allow damages to the remainder or both.

In the Eminent Domain Act (Ill. Rev. Stat., Ch. 47, § 1 et seq.), it is provided:

> "11. Cross Petition.] § 11. Any person not made a party may become such by filing his cross petition, setting forth that he is the *owner or has an interest in property,* and which will be taken or damaged by the proposed work; and the rights of such last named petitioner shall thereupon be fully considered and determined." (Emphasis added.)

We find that it was proper to deny leave to defendant National Bank of Albany Park to file its cross petition. In the instant case any possible damage to the five-acre tract north of Parcel D necessarily depended on whether defendant was the "owner or has an interest" in Parcel D. However, as shown previously, at the time of the cross petition defendant merely had an option to purchase Parcel D and did not "own" it. In *City of Chicago* v. *Equitable Life Soc.*, 8 Ill. 2d 341, 134 N. E. 2d 296 (1956), it is stated (p. 348):

> "It is elementary that a mere intention on the part of the owner to put properties to a common use is not sufficient to allow a cross petition in a condemnation action, but such properties must be considered as they existed at the time the proceedings were commenced, * * * and whether or not the cross petition is proper is a question of law which must be decided by the court. * * * Under the facts and circumstances of this case, we are of the opinion that the properties in question *are not so interrelated* as to warrant their consideration as a single unit."

Defendants next contend that the trial court erred in refusing to allow defendants to introduce five or six ordinances which showed that recently rezonings of property of a comparable use directly across the street had occurred. They note that the only rezoning ordinance which was admitted showed a rezoning to B-5-1 and the jury could

reasonably infer that the other exhibits offered probably related to identical matters. They further note that the allowance of those exhibits "not only would have substantiated Gardner's testimony but showed what usages the city felt were then presently available to the property and further, would have substantiated the testimony of each of defendants' witnesses." They further note that the relevancy and materiality of the zoning ordinances should not be questioned.

Defendants further argue that counsel for plaintiff remarked to the jury that no attempts at rezoning were made until the Board of Education sought to take the property. They note that the excluded exhibits would have contradicted these assertions. Authorities cited include *Lombard Park District* v. *Chicago Title & Trust Co.*, 103 Ill. App. 2d 1, 242 N. E. 2d 440 (1968), and *Dept. of Public Works* v. *Rogers*, 39 Ill. 2d 109, 233 N. E. 2d 409 (1968).

In *Lombard Park District* v. *Chicago Title & Trust Co.*, it is stated (p. 8):

> "Without opening wide the floodgates for such testimony, courts have usually taken the view that a prospective purchaser, on the open market, on a proper showing that a change in zoning was reasonably probable in the reasonably near future, would consider the probability of such change in valuing the property, and that courts in condemnation proceedings should also receive such evidence."

In *Dept. of Public Works* v. *Rogers, it is stated* (p. 114):

> "Were the zoning ordinance inflexible, the trial court could very well have concluded that there was no probability of rezoning. However, the ordinance was proved to be flexible and there was sufficient basis for its introduction in evidence in support of the reasonable probability of the rezoning theory. The fact that the rezoning of the fifty-acre tract was for a different

> purpose and for a much larger area does not destroy its admissibility on the basis that it was irrelevant and immaterial."

Plaintiff contends that the excluded ordinances (defendants' Exhibits 2 through 6) were concerned with an area entirely different from that in which the subject parcels are located and were mostly R-4 zoning for multi-apartment and business uses. We agree with plaintiff's assertion that "defendants were not thereby deprived of their right to show a theory of reasonable probability of rezoning Parcels B, C and D for the reasons that (1) all the defendant's witnesses were permitted to testify to valuations of the condemned property on the basis of a change in zoning there from R-2 to R-4; (2) both the owner Kobelinski and the witness Schorsch testified for defendants to actual rezonings west of Cumberland from R-2 to R-4 to business; (3) a rezoning ordinance of property at the northeast corner of Bryn Mawr and Cumberland, defendants' Exhibit 7, was admitted into evidence; (4) in his final argument to the jury defendants' attorney repeatedly referred to these rezonings on the west side as evidence to be considered on the defendants' theory that there was a reasonable probability of securing rezoning of the subject parcels which he argued emphasized the correctness of the valuation testimony given by the defendants' witnesses based on R-4 zoning."

We conclude that *defendants were not prejudiced* by the court's exclusion of their zoning exhibits. They were in fact *permitted to present their theory* of a reasonable probability of rezoning to the jury. We find no error here.

Defendants next contend that the court erred in refusing to allow into evidence a sale of a one and one-half acre tract zoned R-1 in the area. The record shows that this parcel was not comparable to the parcels involved in the condemnation suit. We find no error here.

Defendants further contend that permitting petitioner to introduce a sale during cross-examination over objection and to introduce a sale upon rebuttal over objection where no contract was produced or foundation of similarity established are further examples of error prejudicial to defendants. We have examined the record and find these parcels had sufficient similarity for the court to permit counsel for plaintiff to go into the sales on cross-examination. Also, the terms and conditions of the contract of sale were not important. The only important thing was when the land was sold and what it was sold for. *Forest Preserve Dist.* v. *Kean,* 298 Ill. 37, 131 N. E. 117 (1921). We find no error here.

In *City of Evanston* v. *Piotrowicz,* 20 Ill. 2d 512, 170 N. E. 2d 569 (1960) it is stated (p. 522):

> "As we have also stated in the past, no fixed or general rule has or could be laid down which governs the degree of similarity that must exist between the properties sold and that condemned to make evidence of the sale or sales admissible; rather, the admissibility of such evidence must in each instance be determined by the trial judge within the proper limits of his discretion."

Defendants further contend that they were improperly denied leave to file a petition by which they sought to establish a new date for valuation of the premises for the condemnation trial. The petition essentially alleged that since the time of the petition on July 14, 1965, until the time for trial, February 3, 1969, the market value of all the property in the vicinity of the subject parcels had substantially increased. Defendants assert that "the petition raised a serious question as to whether using a date of July 14, 1965, under the circumstances of this case would constitute just compensation within the meaning of the constitutional mandate." Defendants' authorities include

Sanitary District v. *Chapin,* 226 Ill. 499, 80 N. E. 1017 (1907), and *Illinois Cities Water* v. *City of Mount Vernon,* 11 Ill. 2d 547, 144 N. E. 2d 729 (1957). In *Sanitary District* v. *Chapin,* it is stated (p. 504):

> "The rule so established, that the value of property is to be fixed as of the date of filing the petition, has been consistently followed ever since. * * * The filing of the petition is the first actual step toward devoting property to a public use, and in ordinary cases that time is as fair and just to both parties for fixing the value of the property as any that could be adopted. At any rate, the rule is firmly established; but if it should be applied to a case like this, where the owner has not been brought into court and no steps have been taken for several years, during which the proprety has greatly advanced in value, it would result in wrong and injustice."

Plaintiff, on the issue of the proper valuation date to be used here, asserts that the trial court rule correctly followed the long-established rule and procedure in Illinois. In *City of Chicago* v. *Riley,* 16 Ill. 2d 257, 157 N. E. 2d 46 (1959), it is said (p. 264):

> "It is well settled that the value of the property must be determined as of the time of filing the petition for condemnation."

In *City of Chicago* v. *Blanton,* 15 Ill. 2d 198, 154 N. E. 2d 242 (1958), it is stated (p. 202):

> "It is of course elementary that eminent domain proceedings were designed to afford the property owner a means by which he would receive in money the full, fair cash market value of the condemned land under the conditions which existed, not at time of trial, but at the time the eminent domain proceedings were instituted."

We find that *defendants have not asserted sufficient facts* to entitled them to a new valuation date. Defendants' cases

are distinguishable on their facts. The record indicates that the attorneys for both sides have tried to expedite the proceedings as much as possible and within their professional responsibilities to their clients.

Defendants next contend that the jury was influenced by passion and prejudice as exemplified by the statements of counsel for plaintiff in closing argument. *We find no merit in this contention.* The remarks made in *County of Cook* v. *Colonial Oil Corp.*, 15 Ill. 2d 67, 153 N. E. 2d 844 (1958), apply here. There the court stated (p. 75):

> "Counsel for defendant also characterizes the closing argument of petitioner's counsel as 'unfair, insulting, full of ridicule of respondent's witnesses and counsel, and so insinuating and vindictive as to be highly prejudicial to the respondent.' First of all, counsel for defendant, who is admittedly experienced in condemnation, made no objection to any of the opening argument of counsel for petitioner and no objection to any of the supposedly objectionable remarks made by petitioner's counsel in his final argument. We have consistently held that experienced counsel cannot take a chance of failing to make objections and then, upon receiving what they consider an adverse jury verdict, claim error."

Defendant finally contend that the cumulative errors denied defendants a fair trial. They assert that "the jury verdicts were approximately $10,000 or so less than in the first trial from which the plaintiffs originally took an appeal. The extreme prejudice which occasioned such a low verdict is confirmed by plaintiff's earlier attempting to waive a retrial after these defendants' motions to dismiss were over-ruled and return again to the jury verdict in 1966 from which they had originally taken an appeal."

After examining this record, we believe defendants received a fair trial on the proper issues *without prejudicial*

error, and the verdict was within the range of the testimony. In *School Trustees* v. *LaSalle National Bank,* 21 Ill. 2d 552, 173 N. E. 2d 464 (1961), our Supreme Court said (p. 556):

> "This court has repeatedly held that where the jury has viewed the premises and the amount fixed is within the range of the evidence, the verdict of the jury will not be disturbed unless the record clearly shows that it has been influenced by passion or prejudice or unless there was a clear and palpable mistake."

These remarks apply here, and the judgment of the trial court is affirmed.

AFFIRMED.

BURMAN, *P. J.,* and ADESKO, *J.* concur.

THE EMINENT DOMAIN ACT OF ILLINOIS.

(Chapt. 47, State Bar Association Edition, 1965, Vol. 1) p. 2027.

1. Compensation—Jury.] § 1. Private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the state in its corporate capacity, such compensation shall be ascertained by a jury, as hereinafter prescribed. Where compensation is so made by the state either party upon application may have a trial by jury to ascertain the just compensation to be paid. Such demand on the part of the state shall be filed with the state's petition for condemnation. Where the state is petitioner a defendant desirous of a trial by jury must file a demand therefor on or before the return date of the summons served on him or fixed in the publication in case of defendants served by publication. As amended by act approved July 11, 1957. L. 1957, p. 2603.

2. Proceedings—Parties.] § 2. Where the right to take private property for public use, without the owner's consent or the right to construct or maintain any public road, railroad, plankroad, turnpike road, canal or other public work or improvement, or which may damage property not actually taken has been heretofore or shall hereafter be conferred by general law or special charter upon any corporate or municipal authority, public body, officer or agent, person, commissioner or corporation and the compensation to be paid for or in respect of the property sought to be appropriated or damaged for the purposes above mentioned cannot be agreed upon by the parties interested, or in case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is a nonresident

of the state, the party authorized to take or damage the property so required, or to construct, operate and maintain any public road, railroad, plankroad, turnpike road, canal or other public work or improvement, may apply to the circuit court of the county where the property or any part thereof is situated, by filing with the clerk a petition, setting forth, by reference, his or their authority in the premises, the purpose for which the property is sought to be taken or damaged, a description of the property, the names of all persons interested therein as owners or otherwise as appearing of record,if known, or if not known stating that fact and praying such court to cause the compensation to be paid to the owner to be assessed. If it appears that any person not in being, upon coming into being, is, or may become or may claim to be, entitled to any interest in the property sought to be appropriated or damaged the court shall appoint some competent and disinterested person as guardian ad litem, to appear for and represent such interest in the proceeding and to defend the proceeding on behalf of the person not in being, and any judgment or decree rendered in the proceeding shall be as effectual for all purposes as though the person was in being and was a party to the proceeding. If the proceeding seeks to affect the property of persons under guardianship, the guardians or conservators of persons having conservators, shall be made parties defendant, and if of married women, their husbands shall also be made parties. Persons interested, whose names are unknown, may be made parties defendant by the same descriptions and in the same manner as provided in other civil cases. Where the property is sought to be taken or damaged by the state for the purposes of establishing, operating or maintaining any state house or state charitable or other institutions or improvements, the petition shall be signed by the governor or such other person as he shall direct, or as shall be provided by law. No property belonging to a railroad or other public utility

subject to the jurisdiction of the Illinois Commerce Commission may be taken or damaged, pursuant to the provisions of this Act, without the prior approval of the Illinois Commerce Commission. As amended by act approved Aug. 24, 1965. L. 1965, p. ....., S. B. No. 563.

11. Cross petition.] § 11. Any person not made a party may become such by filing his cross petition, setting forth that he is the owner or has an interest in property, and which will be taken or damaged by the proposed work; and the rights of such last named petitioner shall thereupon be fully considered and determined (P. 2030).

SCHOOL CODE OF ILLINOIS.

(CHAPT. 122, STATE BAR ASSOCIATION 1965 EDITION VOL. 3, p. 217 & 221).

34—1. § 34—1. Application of Article—Definition of board. This Article applies only to cities having a population exceeding 500,000. "Board" when used in this Article, means board of education.

34—2. § 34—2. City to constitute district—Corporate status of board. Each city having a population exceeding 500,000 shall constitute one school district which shall maintain a system of free schools under the charge of a board of education. The district shall be a body politic and corporate by the name of "Board of Education of the City of ....." and by that name may sue and be sued in all courts and places where judicial proceedings are had.

34—20. § 24—20. Acquisition of real estate—Condemnation proceedings—Title—Conveyances. The board may acquire by purchase, condemnation or otherwise, real estate for any school purposes. Condemnation proceedings shall be conducted in the name of the city, in trust for the use of schools. The title to all real estate held for the use and benefit of the schools shall be held in the name of the city, in trust for the use of schools. All conveyances of real estate shall be made to the city in trust for the use of schools.

MOTION TO DISMISS.

Omitting caption, prayer and signature the motion of defendants as to Parcel B to be dismissed filed herein November 19, 1968 is as follows:

1. Plaintiff failed to prepare any preliminary plans for the construction of a school or to decide on what type of school it would construct on the proposed site.

2. Plaintiff, prior to the initiation of the instant suit, began a prior suit seeking to condemn a site slightly less than three acres of land in the immediate vicinity which was subsequently dismissed. Plaintiff also had initiated a suit prior to this instant suit, seeking to condemn a site of approximately 19 acres, also in the immediate vicinity. This second suit also was dismissed by the plaintiff prior to beginning this suit. By reason of the premises the attempt to take herein demonstrates an attempt to take an excessive amount of property.

3. No reports, surveys, or other basis for a recommendation for the taking, or reason why plaintiff should proceed differently in this suit from its proceedings in the two suits heretofore referred to, appear anywhere of record.

4. Plaintiff has failed to comply with an essential condition precedent to the filing of its petition herein in that it has failed to comply with the provisions of Section 11-12-4 of Chapter 24 of the Illinois Statutes.

5. Since plaintiff relies on the exceptions contained in Section 42 of Chapter 102 of the Illinois Revised Statutes relating to Meetings of Public Agencies to keep from the record any information which enters into its purported exercise of discretion to acquire the real estate here in-

volved, their failure to comply with the duties of the statute requiring their reference to the Chicago Plan Commission constitutes an abuse of power and prevents any reasoned decision or check or balance on the administrative actions of the Board of Education as plaintiff herein. It further prevents any review which might serve to uncover issues which were ignored or inadequately treated by the Board of Education; and refuses to this defendant the constitutional and statutory protections intended by the Illinois Legislature in the Plan Commission Statute. As a result thereof, this defendant is deprived of due process in that there is a complete absence of any review of plaintiff's decision to take this property.

JUDGMENT ORDER OF TRIAL COURT.

Omitting caption and signature, judgment order of court entered herein filed February 11, 1969, is as follows:

This Matter coming on for hearing upon the petition of the City of Chicago in Trust for the Use of Schools, for the ascertainment of the just compensation to be made for the taking by the said petitioner of the fee simple title to the real property described in said petition, and the petitioner, City of Chicago in Trust for the Use of Schools, appearing by James W. Coffey and Frank S. Righeimer, its attorneys;

And it appearing to the Court that all parties defendant herein have been served with process in the manner and form as provided for by statute or have duly entered their appearances;

And the Court having jurisdiction of all the parties defendant to this suit and the subject matter thereof, and all parties interested being before the Court, and the Court

being fully advised in the premises, and having ordered that a separate trial be had as to the real property described in the petition to condemn herein as to Parcels B, C and D, it was ordered that a jury come, whereupon came the jurors of good and lawful men and women, who having been duly selected, examined and sworn, well and truly to ascertain and report the just compensation to be made to the owner or owners of any party or parties interested in the premises sought to be taken by these proceedings, and to each person interested therein, according to the facts in the case as they have been made to appear from the evidence, and having heard the evidence adduced herein, the arguments of counsel, instructions from the Court, bring in their verdict and say:

"We, the jury, impaneled and sworn in the above entitled cause, do find and report that we have ascertained and determined the just compensation to be paid by the petitioner to the owner or owners of and party or parties interested in the real property hereinafter described, together with the improvements thereon, which said petitioner seeks to acquire, as stated in its petition filed in said cause. Said compensation is as follows:

"To the owner or owners of and party or parties interested in:

Parcel B.

The North Two Hundred Thirty-seven (237) feet of the South Eight Hundred Seventeen and Forty-seven one hundredths feet (817.47) feet of Lot Six (6) of the Subdivision of James Pennoyer's Estate in Sections One (1), Two (2), Eleven (11) and Twelve (12), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian, excepting therefrom the West Fifty-five feet (55) taken for street, also excepting therefrom the East one Hundred Eighty-three and Seventy-two one hundredths feet (183.72) of

the West Four Hundred Seven and Forty-four one hundredths feet (407.44) of the South One Hundred eighteen and Fifty-five one hundredths feet (118.55) of the North Two Hundred thirty-seven feet (237) of the South Eight Hundred Seventeen and Forty-seven one hundredths feet (817.47) of said Lot Six (6), all in Cook County, Illinois

together with the improvements thereon, and all private interests in so much of the public streets and alleys as in anywise abut the said lands and premises, as fully compensation to the owner or owners of and party or parties interested in the said real property, for the fee simple title to the aforesaid real property, for the improvements thereon, and for all private interests in the streets and alleys which abut the said real property, the sum of One Hundred Sixty Five Thousand Dollars ($165,000.00).

"To the owner or owners of and party or parties interested in:

Parcel C.

The South half of the North Two Hundred Thirty-seven and three one hundredths feet (237.03) of the South one Thousand Fifty-four and fifty one hundredths feet (1054.50) of Lot Six (6) (except the West Fifty-five feet (55) thereof) in the Subdivision of James Pennoyer's Estate in Sections One (1), Two (2), Eleven (11) and Twelve (12), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian, in Cook County, Illinois

together with the improvements thereon, and all private interests in so much of the public streets and alleys as in anywise abut the said lands and premises, as full compensation to the owner or owners of and party or parties interested in the said real property, for the fee simple title to the aforesaid real property, for the improvements thereon, and for all private interests in the streets and

alleys which abut the said real property, the sum of Ninety-Two Thousand Dollars ($92,000.00).

"To the owner or owners of and party or parties interested in:

Parcel D.

The North half of the North Two Hundred Thirty-seven and three one hundredths feet (237.03) of the South One Thousand Fifty-four and Fifty-one hundredths feet (1054.50) of Lot Six (6) (excepting therefrom the West Fifty-five feet (55) in the Subdivision of James Pennoyer's Estate in Sections One (1), Two (2), Eleven (11), and Twelve (12), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian, in Cook County, Illinois

together with the improvements thereon, and all private interests in so much of the public streets and alleys as in anywise abut the said lands and premises, as full compensation to the owner or owners of and party or parties interested in the said real property, for the fee simple title to the aforesaid real property, for the improvements thereon, and for all private interests in the streets and alleys which abut the said real property, the sum of Ninety Two Thousand Dollars ($92,000.00).

"And we the jury, find that the payment of the said amounts to be paid to the owner or owners of and party or parties interested in said real property will fully compensate said owner or owners of and party or parties interested for the taking by said petitioner of the real property aforesaid, for the uses and purposes set forth in the petition filed in said cause." Which verdict is signed by each and all of the jurors aforesaid.

Whereupon the said petitioner moves for judgment on said verdict and the said defendants being present in the court, and all persons interested being before the court, and the court being fully advised in the premises;

DOTH CONSIDER, ORDER AND ADJUDGE that the sums of money awarded by the jury in and by their verdict to the owner or owners of and party or parties interested in said real property described in said verdict and in the petition filed herein, is just compensation to the owner or owners thereof and party or parties interested therein for the taking of the fee simple title to said real property, and judgment is herein entered accordingly.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the Petitioner, within one hundred eighty (180) days from the entry of this order pay to the County Treasurer of Cook County, Illinois for the benefit of the owner or owners of and party or parties interested in said real property hereinabove described as Parcels B, C and D, the sum of Three Hundred Forty-Nine Thousand Dollars ($349,000.00) plus Forty-Four Dollars ($44.00) as costs of suit plus interest at the rate of 5% from the day the verdict of the jury was returned, February 7, 1969 until date of payment of award, as full compensation for the taking of the fee simple title to the said real property described in the petition to condemn herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED upon said payment to the County Treasurer of Cook County, Illinois, that the petitioner City of Chicago in Trust for the use of Schools, may enter in and upon the above described lands and premises, to wit: Parcels B, C and D and the petitioner thereupon shall become vested with the fee simple absolute title to said real property.

ENTER:

.....

Judge

Dated: February 7, 1969.

PETITIONERS' NOTICE OF APPEAL FILED IN THE TRIAL COURT.

Omitting caption and signature Notice of Appeal defendants filed herein April 11, 1969, is as follows:

I. Now come National Bank of Albany Park in Chicago as Trustee under Trust No. 11-1030, and as Successor in Interest to Exchange National Bank of Chicago as Trustee under Trust No. 15166; and La Salle National Bank of Chicago as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife, defendants-appellants herein, and hereby appeal from the judgment orders as to Parcels B, C, and D herein dated February 7, 1969, and entered February 11, 1969, wherein compensation was fixed for each of said parcels. Said defendants-appellants further appeal from the order entered March 14, 1969, denying their post-trial motion wherein they sought a new trial. Said defendants-appellants further appeal from orders entered herein:

a) denying said defendants-appellants their leave to file a cross petition herein;

b) denying said defendants-appellants their right to have damages assessed in these proceedings to their contiguous property;

c) striking certain portions of their motions to dismiss and denying the requested leave to amend said stricken portions;

c) over-ruling and denying the motions to dismiss of said defendants-appellants after hearing thereon.

II. Said defendants-appellants respectfully pray:

a) that the court find on the basis of the record herein, that the plaintiff, Board of Education of the City of Chicago, denied due process to these defend-

ants-appellants within the meaning of the Fourteenth Amendment to the Constitution of the United States and of Article 2, Section 2, of the Constitution of the State of Illinois.

b) alternatively, that this court reverse the ruling of the trial court over-ruling and denying the motions to dismiss of said defendants-appellants and sustain said motions and remand the cause to the trial court for such further relief as may be required.

c) as a further alternative, that this court reverse the trial court ruling striking certain portions of said motions and remand the cause for hearing on paragraphs 1, 3, 4 and 5 of said motions to dismiss for such further proceedings as may be required.

d) as a further alternative, that this court order a new trial be awarded the said defendants-appellants wherein damages, to be fixed by the verdict of a jury, be awarded to these defendants-appellants for their contiguous property not sought to be taken in these proceedings, in accordance with the mandate of Article 2, Section 13, of the Constitution of the State of Illinois.

e) as a further alternative, that a new trial be awarded to these defendants-appellants herein and the trial court be directed to fix a date subsequent to the date of the filing of the petition herein for evaluation of the premises sought to be taken and evaluation of the damages occasioned to the defendants-appellants contiguous property, so as to comply with the mandate of Article 2, Section 13, of the Constitution of the State of Illinois.

f) as a further alternative, in the event the court does not order a different date for valuation of the premises taken and damaged, that the court rule that the provisions of Section 1 of the Laws of 1963, page

1591, as added by act of the legislature dated July 15, 1963 (120 Ill. Rev. Stat. Sec. 508A) relating to the date of liability for taxes be held unconstitutional as it applies to the defendants-appellants herein, as a taking of property of said defendants-appellants without just compensation.

g) as a further alternative, that this court award said defendants-appellants a new trial and remand to the trial court on the grounds that errors in the admission and rejection of proffered evidence, proffered instructions and in permitting argument by plaintiff's counsel which was prejudicial to these defendants-appellants in the course of the proceedings, which prevented said defendants-appellants from receiving a fair trial.

NOVEMBER 1962 AGREEMENT.

Agreement by which petitioners had acquired all right, title and interest to Parcel C prior to initiation of case in March, 1965, were in possession, collecting rents on all property and under which acquired record legal title to Parcel D during suit.

AGREEMENT.

"THIS AGREEMENT, dated the 20th day of November, 1962, is entered into by and between Walter S. Branda and Florence P. Branda, his wife, hereinafter referred to as Sellers, and Ted Szywala and Mitchell P. Kobelinski, hereinafter referred to as Buyers.

WHEREAS Sellers are the lawful owners of the following described real estate:

The North 237.03 feet of the South 1054.50 feet of Lot 6 (except the West 55 feet thereof) in Subdivision of estate of James Pennoyer in Sections 1, 2, 11 and

12, Township 40 North, Range 12, East of the Third Principal Meridian, in Cook County, Illinois.

and

WHEREAS Buyers have expressed a desire to purchase the afore-described real estate for the sum of $143,500.00 and to resubdivide and develop same:

NOW, THEREFORE, It is expressly agreed as follows:

1. Simultaneously with the execution of this Agreement, Buyers have paid and delivered the sum of $8,500.00, receipt of which is hereby acknowledged by the Sellers.

2. Sellers will immediately cause title to the above described real estate to be conveyed by Warranty Deed in Trust to The Exchange National Bank of Chicago as Trustee under its customary form of "land trust agreement", with the Sellers designated as the beneficiaries of the said trust.

3. Sellers will immediately make application for a Report on Title issued by the Chicago Title and Trust Company for the purpose of showing good and merchantable title to the said property in the Exchange National Bank of Chicago, as Trustee, under the trust agreement made pursuant to paragraph 2 above, subject only to the following:

(a) Special taxes or assessments for improvements not yet completed;
(b) General taxes for the year 1962 and subsequent years;
(c) Building, building line and use or occupancy restriction conditions and covenants of record;
(d) Zoning and building laws or ordinances;
(e) Standard objections contained in its Owners Title Guarantee policies.

If the report on title discloses any defects in title (other than such usual objections contained in Owners' policies

and the matters to which this sale is subject by the terms hereof), Sellers may cure such defects. If such defects in title be not cured within 60 days from the date of the preliminary report on title, this contract thereupon shall, at the option of the Buyers, become null and void and the initial payment of $8,500.00 shall be returned to Buyers and the liability of the Sellers is hereby limited only to the return of said $8,500.00. However, Buyers may elect to take the title as it then is, with the right to deduct from the purchase price liens or encumbrances of a definite or ascertainable amount. Simultaneously with the delivery of report of title, Sellers shall deliver a Plat of Survey.

4. In the event title is found to be good and merchantable, or is acceptable to the buyers, then the Buyers shall within ten days thereafter pay the additional sum of $15,000.00 plus $550.00 for two gas space heaters and one Admiral refrigerator now on the subject premises, and the Sellers shall simultaneously with such payment execute an irrevocable direction to the said Trustee to issue Trustee's Deeds only on the written direction of the Buyers under the following terms and conditions:

(a) On or before May 1, 1963, but not prior to January 1, 1963, the Buyers shall have the right to direct the Trustee to issue its Trustee's Deed conveying the Southwest one-quarter of the subject premises.

(b) On or before May 1, 1964, but not prior to January 1, 1963, the Buyers shall have the right to direct the Trustee to convey the Southeast one-quarter of said property.

(c) On or before May 1, 1965, but not prior to January 1, 1964, the Buyers shall have the right to direct the Trustee to convey the Northeast one-quarter of said property.

(d) On or before May 1, 1966, but not prior to January

1, 1964, the Buyers shall have the right to direct the Trustee to convey the remaining property in said trust.

(e) Each of the foregoing directions to convey shall be honored by the Trustee only if accompanied by a certified or cashier's check payable to the order of the Sellers in a sum equal to $30,000.00 plus interest at 5½% on the total amount of installment payments then remaining unpaid. Interest on the original payment shall be computed from January 1, 1963, and interest on all subsequent payments shall be computed from the day of the last payment received by the Trustee. All such payments received by the Trustee shall be immediately forwarded to the Seller.

5. General real estate taxes for the year 1962 shall be paid by the Sellers. General real estate taxes and fire insurance for the years 1963 and subsequent years shall be paid by the Buyers.

6. After the payment of the additional sum of $15,000.00 as required by paragraph 4, the Buyers shall thereafter have the legal right to possession of the premises and the right to any income accruing therefrom, but shall not have the right to remove or substantially modify any of the improvements on said premises, nor commence any construction activity thereon other than surveys and soil tests.

7. After the Buyers have acquired the first portion of said real estate, they shall thereafter have the right to direct the Trustee to execute a Plat of Subdivision covering the property so acquired together with any property still remaining in the trust, dedicating such portion of said property as may be necessary for the creation, extension or widening of streets and alleys and for the dedication of easements for public utilities, provided, however, that the dedication of any portion of land for public use for which payment has not theretofore been made shall not exempt the Buyers from payment for such land.

8. After the Buyers have acquired the first portion of said real estate, they shall thereafter have the right to enter into contracts for surface and underground site improvements such as streets, alleys, sewers, etc., on the property so acquired and on the property still remaining in the trust, provided, however, that each and every contract for site improvements on the property still remaining in the trust shall contain an express, full and complete waiver and release of any and all liens or claims or rights of lien against the property still remaining in the trust, and provided a signed copy of each and every such contract together with the plans and specifications are promptly delivered to the Sellers before work begins; in the alternative, Buyers may furnish at their own expense a bond in an amount equal to the cost of the improvements.

9. Buyers further agree that under no circumstances will they be entitled to any reimbursement from Sellers for surface or underground improvements made upon said tract of land or any portion thereof.

10. Before demolishing any buildings on the subject premises, the Buyers shall give the Sellers 30 days written notice of their intention to demolish, and the Sellers shall have the right in such intervening time to remove such fixtures, storm windows, storm doors, cabinets and other salvable materials from said property as they desire, including trees and shrubs, which may be removed at any time.

11. Sellers will provide Buyers with the customary form of Chicago Title and Trust Company Title Insurance Policy. A Policy or Preliminary Report on Title is to be delivered for an amount equivalent to the sum paid the Trustee within ten days of the issuance of the Deed by the Trustee covering the separate parcels of real estate conveyed by the Trustee at the time.

12. All Trustee's fees in connection with said Trust

Agreement shall be paid by Buyers. Buyers shall pay all costs for surveys, preparation of Plats of Subdivision and recording, and shall furnish copies thereof to Sellers.

13. The several deposits of money to be made by Buyers with the Trustee as hereinabove set forth shall be deposited within the time stated, as time is of the essence of this contract. In case of default in making any such deposits of money when due as herein specified, and such default shall continue for 15 days beyond each respective due date, this agreement shall thereupon be terminated and of no further force or effect. All monies theretofore deposited or paid to Sellers shall be retained by Sellers as either payment for real estate theretofore conveyed or as liquidated damages, and Buyers shall be released from the obligation to purchase any or all of the remaining real estate and to make any additional deposits of money on same. Whatever real estate shall remain in the name of the Trustee shall be free and clear of any direction by Buyers, and all rights of Buyers to direct the Trustee to convey any part or all of the real estate or lots shall be revoked, shall cease and be of no force, effect or validity whatsoever, and Sellers alone shall be vested with the right, power and authority to direct the Trustee in making of deeds for or to otherwise deal with the title to said real estate.

14. No waiver of a breach of any term or condition shall be waiver of any other or subsequent breach of the same or of any other term or condition.

15. All notices and demands herein required shall be in writing. The mailing of a notice by certified mail to the Sellers c/o Edward S. Coath, 29 South LaSalle Street, Chicago, Illinois, or to the Buyers at 5345 North Harlem Avenue, Chicago 31, Illinois, shall be sufficient service thereof.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals on the aforementioned date."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

Supreme Court, U.S.
FILED
MAR 1 1971
E. ROBERT SEAVER, CLERK

No. 1411

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners,

Consolidated With

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

JOHN PRZYWARA, ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

JOHN B. MURNIGHAN,
GREEN, MURNIGHAN & KANE ASSOCIATES,
228 North La Salle Street,
Chicago, Illinois 60601,
ST 2-0293,
Attorney for Petitioners, National Bank of Albany Park in Chicago, as Trustee Under Trust No. 11-1030, Individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee Under Trust No. 15166; and La Salle National Bank of Chicago, as Trustee Under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, His Wife.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinions Below	2
Judgment Below	2
Jurisdiction	3
Questions Presented for Review	3
Constitutional Provisions and Statutes Involved	3-4
Statement of Case	4-7
Manner in Which Federal Question Raised and Disposed	7
Reasons for Granting Writ in Support of Petition	
A. Denial of Hearing on Motion to Dismiss	8
B. Denial of Severance Damages	10
Conclusion	16

(Appendix Presented Separately.)

List of Authorities Cited.

Cases.

Board of Education v. City of Chicago, 402 Ill. 291, 83 N. E. 2d 714, 718	6
Chicago & Evanston R. R. v. Dresel, 110 Ill. 89	11
Chicago, Burlington & Quincy R. R. v. City of Chicago, 166 U. S. 226, 235, 241, 246	12
Chicago Santa Fe Ry. v. Ward, 128 Ill. 349	11
City of Chicago in Trust for Schools v. Robertson, 48 Ill. App. 2d 241, 198 N. E. 2d 192	10
Dept. of Public Works v. Bohne, 415 Ill. 253, 113 N. E. 2d 319, 324	11

Dept. of Public Works v. Diel, 89 Ill. App. 2d 130, 232 N. E. 2d 133 11

Johnson v. F. & M. Ry., 111 Ill. 413, 416-7 9

People v. Shedd, 217 U. S. 597 11

Shay v. Penrose, 25 Ill. 2d 447, 185 N. E. 2d 218, 219 10

State Highway Commission v. Miller (S. Dak.), 155 N. W. 2d 780, 782-3 10

Stevenson v. Loehr, 57 Ill. 509 10

Trustees of Southern Illinois University v. Lange, 28 Ill. 2d 229, 190 N. E. 2d 789, 790 6

U. S. v. Carmack, 329 U. S. 230, 243-45 6

U. S. v. Dickinson, 331 U. S. 745, 750 8-9

U. S. v. Grizzard, 219 U. S. 180, 185 ..... 8, 9

U. S. v. Miller, 317 U. S. 369, 376 8

U. S. v. Nudelman, 104 F. 2d 549, 551 6

U. S. v. Welch, 217 U. S. 333 8

Other.

The Fourteenth Amendment, United States Constitution 2, 8, 12

28 U. S. C. 1257(3) 2, 8

Art. 2, Sec. 2, Bill of Rights, Illinois Constitution 2, 8

Art. 2, Sec. 13, Bill of Rights, Illinois Constitution .. 3

47 Ill. Rev. Stat., Secs. 1, 2 and 11 (Eminent Domain Act) 3, 9

122 Ill. Rev. Stat., Secs. 34-1, 34-2 and 34-20 (School Code) 3

Traynor, C. J., 17 Vanderbilt L. R. 109, 117 7

INDEX TO SEPARATE APPENDIX.

PAGE

Appellate Court of Illinois

Opinion in No. 51710 ..... A2

Opinion in No. 54685 ..... A6

Illinois Statutes

Eminent Domain Act §§ 1, 2 ..... A29

Eminent Domain Act § 11 ..... A31

School Code § 34-1, 34-2, 34-20 ..... A31

Judgment Order of Trial Court A33

Motion to Dismiss A32

Notice of Appeal A38

November 1962 Agreement A40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. .....

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST NO. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST NO. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST NO. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners,

Consolidated With

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

JOHN PRZYWARA, ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST NO. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST NO. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST NO. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

National Bank of Albany Park in Chicago, as Trustee under Trust No. 11-1030, individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee

under Trust No. 15166; and La Salle National Bank of Chicago, as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife, petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered December 2, 1970, denying petitioners leave to appeal from the final judgment of the Appellate Court, First District, entered in this case on June 15, 1970, affirming a trial court judgment entered February 11, 1969.

OPINIONS BELOW.

This case has appeared in reports twice. The first opinion is that of the Illinois Appellate Court, First District, in case No. 51710, reported in 95 Ill. App. 2nd 258; 238 N. E. 2nd 434 (April 1968) (App. A2). The second opinion is also that of the Illinois Appellate Court, First District, in case No. 54685, reported in 127 Ill. App. 2nd 51; 261 N. E. 2nd 711 (Jun. 1970) (App. A7).

JUDGMENT BELOW.

June 15, 1970, the Appellate Court of Illinois, First District, entered its judgment in this cause affirming the *nisi prius* court (the Circuit Court of Cook County, Illinois) judgment order entered February 11, 1969, on a jury verdict (App. A33). A petition for rehearing was filed in the Appellate Court of Illinois July 6, 1970, and denied on August 3, 1970.

A petition for leave to appeal to the Supreme Court of Illinois from the judgment of the Appellate Court, First District, was denied December 2, 1970. A limited motion for reconsideration by the Illinois Supreme Court of its order denying petition for leave to appeal was denied January 26, 1971.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Sect. 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a defendant-landowner who has attempted to show that a public body has abused its discretion in an eminent domain case is deprived of due process of law when he is prevented from presenting issues and evidence in support thereof notwithstanding remandment from an Appellate Court for the purpose of holding such hearing?

2. Whether a defendant-landowner in an eminent domain case has been deprived of just compensation within the meaning of the Fourteenth Amendment when he is prevented by court order from the right to present the issue of severance damages to a jury arising from the fact that he is possessed and owner of a larger tract than is described in the condemnation complaint?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Fourteenth Amendment, United States Constitution.

2. Article 2, Section 2, Bill of Rights, of the Constitution of Illinois:

> "No person shall be deprived of life, liberty or property, without due process of law."

3. Article 2, Section 13, Bill of Rights, of the Constitution of Illinois:

> "Private property shall not be taken or damaged for public use without just compensation. Such compensa-

tion, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken."

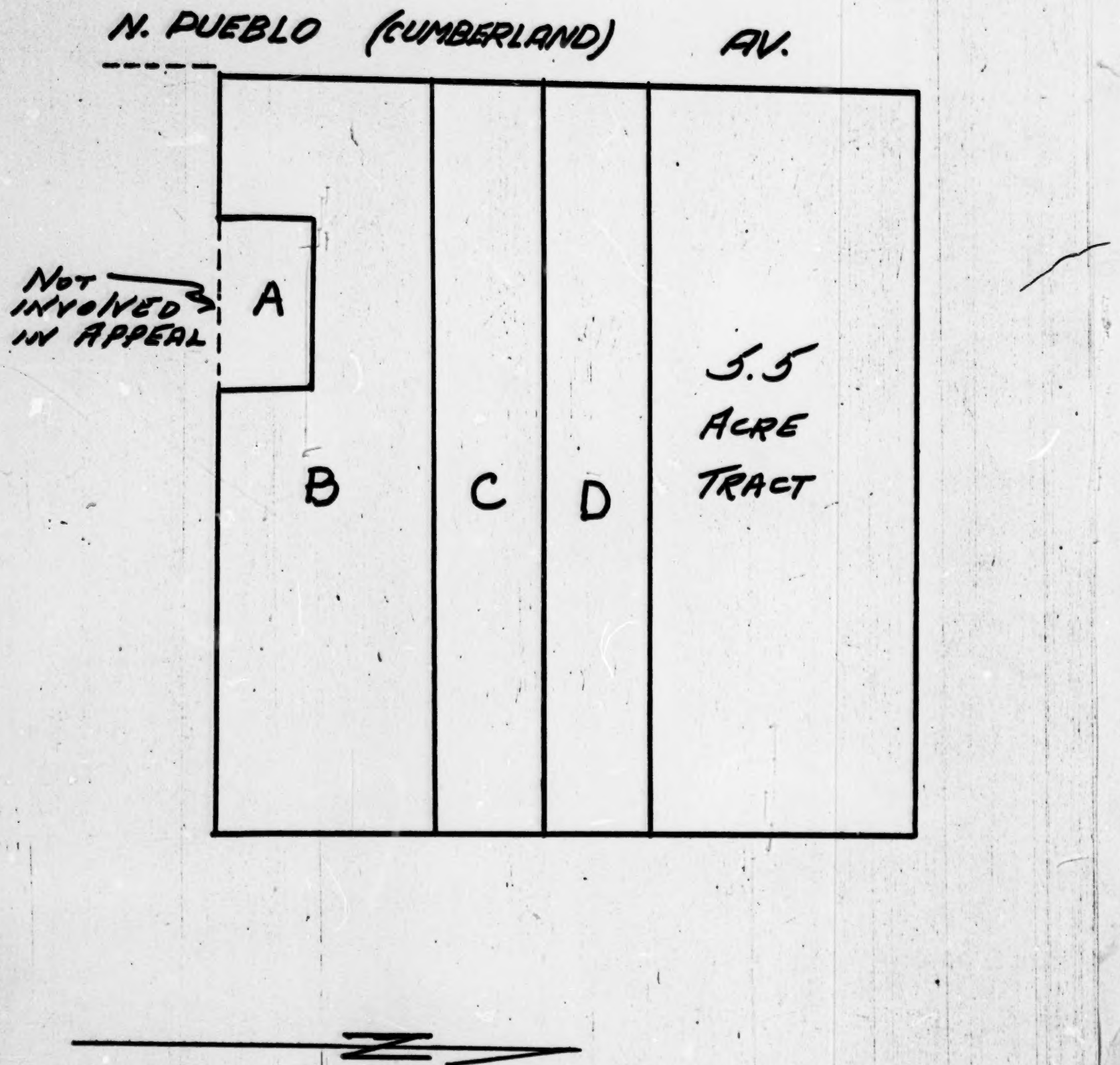
4. The Eminent Domain Act of Illinois (Chapt. 47 State Bar Association Edition, 1965) Sections 1, 2, and 11. Set forth in Appendix in full. No terms thereof are in question but Sections 1 and 2 repeat the constitutional provision against damaging property without compensation (App. A29).

5. The School Code of Illinois (Chapt. 122, State Bar Association 1965 Edition) Sections 34-1, 34-2, and 34-20. Set forth in Appendix only to show plaintiff's status (App. A31).

STATEMENT OF THE CASE.

This is an Eminent Domain proceedings commenced in March, 1965, by the Board of Education of the City of Chicago (herein called Board) to acquire Parcels B, C, and D, which consist of approximately ten acres of vacant land, in the far northwest corner of the City of Chicago. There is no place for further expansion of the city; to the north is the Kennedy Expressway and the City of Park Ridge. To the west is an extensive forest preserve. To the south the city adjoins the Village of Norridge. Cumberland Avenue (also known as Pueblo), is the major north-south street in the area and, at its juncture with the Kennedy Expressway 1 block away, there is a full four-way cloverleaf, the last major access prior to entering O'Hare International Airport. The location of the parcels in the case and the contiguous 5.5 acre tract petitioners owned are shown on the attached sketch.

The owner and record title holder of Parcel B is La Salle


N. PUEBLO (CUMBERLAND) AV.
NOT INVOLVED IN APPEAL
A
B
C
D
5.5 ACRE TRACT
N

National Bank of Chicago as Trustee under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, his wife, who sold to the trustee during the pendency of the case.

The owner and record title holder of Parcel C and the 5.5 acre tract immediately north at all times pertinent has been National Bank of Albany Park in Chicago as Trustee under Trust No. 11-1030.

The record legal title to Parcel D at the beginning of the suit was in Exchange National Bank of Chicago as Trustee under Trust No. 15166, subject to a contract of sale (App. A40). Possession, the right to subdivide, to dedicate streets, to grant easements, etc. under the terms of that contract were in the contract purchaser, the identical person who was the beneficiary and equitable owner under both the National Bank Trust and the LaSalle Trust.

The Board had taken an appeal from a prior trial, held March, 1966, contending the verdicts were excessive and the results of passion and prejudice. Petitioners had cross-appealed contending they were denied due process in the trial court's refusal to entertain motions to dismiss. Petitioners also had sought leave to have damages assessed to a remaining contiguous parcel they owned upon the trial, which leave was denied by the trial court; the Appellate Court did not reach this issue. The Appellate Court of Illinois in case No. 51710 (App. A2) reversed judgment in favor of the Board and remanded the cause, upholding petitioners' cross-appeal. The opinion of that Court said:

> "We believe that defendants were entitled to a hearing on the petitioner's (the Board's) right to condemn." (App. A5.)

On remand, over objection of the Board, petitioners filed amended motions to dismiss Parcels C and D and a Motion to Dismiss as to Parcel B (all identical) (One is set

forth in full in the App., p. A32). The Board then filed a motion to strike the Motions to Dismiss as legally insufficient. Despite the Appellate Court opinion, the court struck paragraphs 1, 3, 4, and 5 of petitioners' motions and denied leave to amend.

The following court day, the court heard evidence on the one remaining paragraph of the Motions to Dismiss. The Board introduced its resolutions authorizing the taking, containing the language "it is necessary and desirable to acquire the said real estate for school purposes". The Board offered no other evidence and no other evidence was required of it by the trial court.

Petitioners then introduced evidence that the Board, after beginning and abandoning two prior cases (one of 2.9 acres) condemning property in the immediate vicinity, changed the size of this site from 7.92 to 12.8 to 10.5 acres on at least five occasions in this instant suit. The Board also had pending a proceeding to acquire a site approximately four blocks away of 3.5 acres, which would provide school facilities for all children in the area in kindergarten through eighth grade and such school is presently under construction.

Upon conclusion of petitioners' evidence, the trial judge asked "what if they (the Board of Education) learned they made a mistake"? Without requiring any evidence or argument from the Board it overruled and denied the Motions to Dismiss.

The trial court, on its own motion, then ordered any and all petitions or motions to be presented solely upon leave of court first obtained within ten days. Petitioner National Bank of Albany Park, owner of Parcel C, and substituted for the original defendant to Parcel D, asked leave to file a cross-petition for damages to the 5.5 acre remaining tract immediately north of and contiguous to Parcel D in these

proceedings. The trial judge ruled that the contract (App. A40) under which petitioner had acquired Parcel C in two steps prior to the filing of this case, was in possession and collecting rents on both C and D and had also acquired record title to Parcel D after the filing of this case was an "option". He denied leave to file the cross-petition. The Appellate Court of Illinois, First District, affirmed this ruling, in case No. 54685 (App. A22).

MANNER IN WHICH FEDERAL QUESTION RAISED AND DISPOSED OF.

The first reference by petitioners that they were deprived of due process is contained in the Motions to Dismiss and Amended Motions to Dismiss (all identical, App. A32) filed in the trial court on behalf of all petitioners here (R. 35). The Motions to Dismiss were disposed of by order of court January 3, 1969, striking paragraphs 1, 3, 4, and 5 (R. 155), which order denied leave to amend, and by order of court January 6, 1969, denying and overruling the remainder (R. 161). Leave was sought to file these petitioners' cross-petition for damage to the remaining 5.5 acre contiguous tract January 10, 1969 (R. 178), and was denied that day.

In petitioners' post-trial motion, they claimed it was error to require petitioners to proceed to trial without allowing severance damages to contiguous property to be assessed (R. 213). March 10, 1969, the trial court denied this. Petitioners' Notice of Appeal (R. 237) from the final determination of the Circuit Court of Cook County to the Appellate Court of Illinois, First District, was filed April 11, 1969. Please note paragraphs a) and d) of the prayer thereof (App. A38-9).

This appeal was allowed as a matter of right but denial in the trial court of due process was not specifically con-

sidered or passed on by the Appellate Court of Illinois, First District. In case No. 54685 leave to appeal to the Supreme Court of Illinois was denied on December 2, 1970.

REASONS IN SUPPORT OF PETITION.

A. Concurrently with the expansion of population there has been an expansion of the services which people expect from their government. To provide such services, public agencies have been granted the right to acquire or dispose of real property so as to carry out their purposes. That this will lead to geater frequency of the taking of private property by public bodies would seem to follow. Likewise, it should follow that more frequently will defendants seek to contest such taking.

The rule in Illinois historically has been that questions as to the sufficiency of an eminent domain proceedings or the authority of a plaintiff to condemn must be raised by motion to dismiss filed prior to impaneling of a jury. When such motion is filed the burden of proof is upon the taking body to make a prima facie proof of the disputed averments, *U. S.* v. *Nudelman,* 104 Fed. 2d 549, 551; *Board of Trustees of Southern Illinois University* v. *Lange,* 28 Ill. 2d 229, 190 N. E. 2d 789, 790; *Board of Education* v. *City of Chicago,* 402 Ill. 291, 83 N. E. 2d 714, 718. The latter case holds it is a matter of right of a defendant to contest a complaint to condemn, as did the first opinion in this case.

The Appellate Court established as the law of this case that petitioners were entitled to a hearing. Despite this, four out of five paragraphs of the petitioners' motions to dismiss were stricken; the trial court and later the Appellate Court apparently accepting the misinterpretation thereof placed on them by the Board whose decision was being questioned. Paragraphs 1 and 3 of those motions, taken together, state that the Board had not decided on what

type of a school it might build and had had no reports, surveys or other basis or reason why it should proceed. Those stricken allegations should be considered true for these purposes, and petitioners contend that this establishes a complete abuse of discretion by the Board.

It beggars common sense to label as a hearing the trial court's peremptory dismissal of the Board's many changes of site without the Board proffering any reason therefor. No burden of proof was placed upon the Board and no proof at all required. The Board cannot contend that it made an effort to arrive at a fair and reasoned conclusion before choosing as in *United States* v. *Carmack*, 329 U. S. 230, 243-45, 91 L. Ed. 209, 67 S. C. 252. It has tried at all stages herein to have its burden carried solely by its allegation the land is necessary for school purposes contained in its resolution. Petitioners' position regarding this "administrative decision and lack of review thereof" is set forth in a quotation from Mr. Chief Justice Traynor of the California Supreme Court, 17 Vanderbilt Law Review 109, 117:

> "A person has not had a fair hearing if the one in authority, given discretion to adjudge the case in the ample terms of a general policy, has exercised his discretionary power not with the realistic appropriateness that is the very justification of such power, but with such harsh inappropriateness as to mock the meaning of discretion. A court reviewing an alleged abuse of discretion, and finding a prima facie case of arbitrariness, must be alert to ascertain whether or not there emerges from the record some reasonable explanation for the administrative decision. We cannot take it for granted that because an authority is, he thinks. The thought process, or the absence thereof, of the one in authority has more than once been the key to determining the issue of due process in administrative proceedings."

This record is devoid of any reasons for the Board's actions. It further lacks any showing that those decisions it made were peculiarly within the Board's expertise. Petitioner's motion to dismiss at least challenged the Board to establish some reasonable basis for its actions. None was forthcoming; none was required of the Board by the Illinois courts which never received any "key to determine the issue of due process."

The procedure of a motion to dismiss or traverse to contest an eminent domain proceedings has not been changed in any way by the Illinois Legislature. Yet this case results in the law now preventing a landowner from questioning whether a public body has abused the power of eminent domain except in the rare instance where a technical defect has occurred in the adoption of a resolution or ordinance. If the law has not thus been changed then this is the first Illinois case in which a motion to dismiss or traverse was held legally insufficient to raise an issue.

B. No constitutional provision, Federal or Illinois, limits compensation for condemning property for a public use to the taking of only record legal title, yet this is the effect of the decisions in this case of the Illinois Courts. The reason assigned by the trial court and the Appellate Court for denying petitioners severance damages was that the November 1962 installment purchase agreement was an option because it had a liquidated damages clause in it; as though any agreement of any kind or nature which has a liquidated damages clause in it is therefore only an option. The Board did not question the fact that petitioners were in possession and using the premises (Parcels C, D, and the 5.5 acres) as a tract, but the Court failed to give any consideration to this unified equitable ownership. Petitioner National Bank of Albany Park, as Trustee, at the very inception of the lawsuit and at all times pertinent,

including the present, has had all of the bundle of rights including full record legal title to the 5.5 acre tract and to Parcel C, and was purchasing Parcel D under the installment sales agreement. Subsequent to initiation of this suit petitioner completed the payments required under the agreement and acquired record legal title to Parcel D (the only right in the bundle petitioner could not have acquired at the time the case began).

Since a portion of the tract has been taken, under the constitutional provisions petitioner should have been entitled to have severance damages assessed to the remainder. They were denied that right. This is not in accord with what the Fourteenth Amendment to the Constitution provides and has been interpreted to mean. *U. S.* v. *Miller,* 317 U. S. 369 at 376, 87 L. Ed. 336, 63 S. C. 276, citing Lewis, Eminent Domain, Third Edition 686; Nichols, Eminent Domain, Second Edition, Section 236; *U. S.* v. *Welch,* 217 U. S. 333, 54 L. Ed. 787, 30 S. C. 527, and *U. S.* v. *Grizzard,* 219 U. S. 180, 55 L. Ed. 165, 31 S. C. 162. Article 2, Section 2 and Article 2, Section 13 of the Illinois Constitution must be interpreted in the same way. Also to the same effect is this court's statement in *U. S.* v. *Dickinson,* 331 U. S. 745 at 750, 91 L. Ed. 1789, 67 S. C. 1382, where the court said:

> "When a part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account." Quoting Bauman v. Ross, 167 U. S. 548 at 574 with approval.

The closing words of *U. S.* v. *Grizzard* are particularly apropos, 219 U. S. 180, commencing at 185 where this court says:

> "To say that an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation

> to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice."

The issue is not whether a landowner of property in a condemnation is entitled to severance damages on contiguous property on which he only has an option. The issue is whether or not there were sufficient incidents of ownership of the whole tract so that upon the taking of portions thereof, such as Parcels C and D, defendants were entitled to severance damages to the remainder. They were not permitted to make such an issue.

Your petitioners attempted at all times to preserve their rights following the procedure long established in Illinois. This procedure is set forth in the case of *Johnson et al.* v. *F. & M. R. Ry. Co.*, 111 Ill. 413 (1884) at pages 416-17. The substance of this opinion is that a party, by implication of Sec. 11 of the Illinois Eminent Domain Act, has the right where his interests are not fully set forth in the condemnation complaint, to cross-petition for damages so that the constitutional guarantee is afforded. Petitioners were prevented from having a jury assess severance damages when leave to file their cross-petition was denied. If Section 11 of the Illinois Eminent Domain Act is construed so as not to protect petitioners right to severance damage under the Fourteenth Amendment, then Sec. 11 is unconstitutional.

The Illinois Appellate Court is totally wrong in calling the agreement of November 20, 1962, an option agreement. An option is the right to decide some time in the future whether or not you will purchase property. The November 1962 contract was an agreement for the sale and purchase of real estate with payments to be made in installments; the recitals therein confirm this. The execution by the sellers of an irrevocable letter of direction to convey given

to the land trust holding title to the property would otherwise be absolutely meaningless. Additionally, the opinion of the Appellate Court conflicts with the decision of the court in *Shay* v. *Penrose,* 25 Ill. 2d 447, 185 N. E. 2d 218 at 219, where it is decided a similar liquidated damages clause in a sale-purchase agreement does not prevent equitable conversion. Bear in mind that legal title to Parcel C had already been conveyed under that same agreement.

The condemnation of the land under the right of eminent domain is, in fact, for the purposes of the present question, a sale of it. *Stevenson* v. *Loehr,* 57 Ill. 509 (1871). *City of Chicago in Trust for Schools* v. *Robertson,* 48 Ill. App. 2d 241, 198 N. E. 2d 192 (1964). Only petitioners under the terms of the November 1962 agreement, had the right to sell since the vendors in that agreement had irrevocably parted with any control over any part of the property, including record title thereto. As was said in *State Highway Commission* v. *Miller* (Sup. Ct. of S. Dak.), 155 N. W. 2d 780 (1968) at 782-3:

> "Wolfe v. Iowa Ry. & Light Co., 178 Iowa 1, 155 N. W. 324, determined a vendee in contract for deed was a proper party to a condemnation proceeding. After describing the relationship of the parties to the contract in terms similar to that stated in Renner v. Crisman, supra, the court said:
>
> > 'In the case before us, it is not very material whether we call the Wolfes the equitable owners of the land or whether we characterize their interest by some other term. They did have a fixed and vested interest in the real estate * * *'.
>
> "In Pierce County v. King, 47 Wash. 2d 328, 287 P. 2d 316, the court wrote:
>
> > 'We hold that, under the above statute (providing necessary parties in a condemnation proceeding), a vendee in possession under an executory con-

> tract is included within the meaning of terms, "other person or party interested," and is a necessary and proper party to condemnation proceedings.'
>
> "Similarly in another condemnation proceeding, Commonwealth, Dept. of Highways v. Devillez, Ky., 400 S. W. 2d 520, considered the status of the vendees in a contract for deed and concluded they 'had such an equitable and beneficial interest in this property as to be properly treated as the owners thereof.' State v. Bradshaw Land & Livestock Co., 99 Mont. 95, 43 P. 2d 674, appears to be in accord."

We respectfully suggest to the court that even if the November 1962 agreement be considered an option, the law in Illinois requires that it be considered exercised for purposes of eminent domain valuation. The case of *Department of Public Works* v. *Bohne,* 415 Ill. 253, 113 N. E. 2d 319, involved the valuation of a leasehold for ten years with an option to renew in lessee for another 10 year term. The court held that the owner of this leasehold interest was entitled to be awarded compensation for such interest (which obviously could be lost if installment payments of rent were not made). The court said (p. 324 of 113 N. E. 2d):

> "That market value was enhanced by the option to renew, which, in effect, extended the lease to a term of 20 years, * * * (citations), and by the permanent improvements, notwithstanding the fact that they would revert to the lessor on termination of the lease. (Citations.)"

The Illinois courts thus value for eminent domain purposes other interests than full fee title interest. The above case involved a leasehold which is only a chattel real but still an interest in land. The *People* v. *Shedd,* 217 U. S. 597, 54 L. Ed. 896, 30 S. C. 696, affirming 241 Illinois 155, 165 (1909). Those same Illinois courts have gone quite far in allowing severance damages as shown by *Department*

of Public Works v. *Diel,* 89 Ill. App. 2d 130, 232 N. E. 2d 133. *Chicago and Evanston RR* v. *Dresil,* 110 Ill. 89 (1884) and the unusual case of *Chicago Santa Fe Ry.* v. *Ward* (1889), 128 Ill. 349 where a mere right to use while having personal property on the condemnor's land makes the defendant an "owner" or "interested in" so as to be awarded severance damages when his adjoining land is taken.

If, as shown, such interests are entitled to compensation when taken for a public use, they should be held sufficient interest when taken to claim severance damages to contiguous property completely owned but not taken. This right to such severance damages for the 5.5 acre tract was completely denied petitioners.

This court has already held in re-examining the final judgment of the Supreme Court of Illinois in an eminent domain case, that the State's judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment (the Fourteenth Amendment). *Chicago Burlington & Quincy R. R.* v. *City of Chicago,* 166 U. S. 226, 234-5, 41 L. Ed. 979, 17 S. C. 581. In this case your petitioners claim they were not given the fullest opportunity to be heard, and thus due process was violated. This court has further stated in the same case at page 241:

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

This court further said, at page 246:

> "We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation."

Petitioners here contend the trial court and the Appellate Court of Illinois not only prevented the jury from determining severance damages but also denied petitioners right to any compensation for property damaged.

CONCLUSION.

Due protection of the rights of property has been regarded as a vital principle of republican institutions said Mr. Justice Harlan in the same case (P. 235), in 1896. Petitioners believe they have shown a complete deprivation of due process by the courts of Illinois in defiance of Illinois' own law and constitution, while at all times Petitioners have attempted to assert and protect those rights. They respectfully pray the issuance of a Writ of Certiorari to the Supreme Court of Illinois in the circumstances of this case.

Respectfully submitted,

JOHN B. MURNIGHAN,
GREEN MURNIGHAN & KANE ASSOCIATES,
228 North La Salle Street,
ST 2-0293,
Chicago, Illinois 60601,
Attorney for Petitioners, National Bank of Albany Park in Chicago, as Trustee Under Trust No. 11,1030, Individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee Under Trust No. 15166; and La Salle National Bank of Chicago, as Trustee Under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, His Wife.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 29 1976
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 1411

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Respondent,

vs.

ALBERT J. SCHOESCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,
Petitioners,

Consolidated With

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Respondent,

vs.

JOHN PRZYWARA, ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,
Petitioners.

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JAMES W. COFFEY,
FRANK S. RICHEIMER,
228 North La Salle Street,
Chicago, Illinois 60601,
Attorneys for Petitioner.

FRANK S. RICHEIMER,
RICHARD E. GIBARD,
Of Counsel.

THE CHURCHILL-HOBBS PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Map	Opposite page 2
Opinions Below	2
Question Presented	3
Constitutional and Statutory Provisions	3
Statement of the Case	4
Description of the Property	4
Hearings on the Different Motions to Dismiss	6
Parcel E Motion	6
Parcel C and D Motions Before Remand	6
Hearings on Motions to Dismiss as to Parcels B, C and D After Remand.....	7
The Claim for Severance Damage	10
Reasons for Denying Writ	12
A. Petitioners Have Failed to Show Constitutional or Any Other Federal Rights Were Violated by the Holdings of the Illinois Courts That There Was No Severance Damages	12
B. Illinois Courts Have Heard and Properly Ruled on Petitioners' Motion to Dismiss the Condemnation Proceedings and Held That the Board Could Acquire the Subject Property for a School Site. No Substantial Federal Question Exists	18
Conclusion	23
Appendix	A1

TABLE OF CASES.

City of Chicago v. Vaccarro, 408 Ill. 587, 596, 97 N. E. 2d 766 18

City of Chicago in Trust for the Use of Schools v. A. J. Schorsch Realty Co., 95 Ill. App. 2d 264, 238 N. E. 2d 426 ..... 2, 18

City of Chicago in Trust for the Use of Schools v. Blanton, 15 Ill. 2d 198, 201, 154 N. E. 2d 242 ..... 15, 17

Deerfield Park District v. Development Corp., 22 Ill. 2d 132, 174 N. E. 2d 850 21

Illinois Iowa Power Co. v. Rhein, 369 Ill. 584 19

Keogh v. Peck, 316 Ill. 318, 328, 147 N. E. 266 ..... 14, 17

Pittsburgh, Ft. Wayne and Chicago Railway Co. v. Sanitary Dist., 218 Ill. 286 19

Poole v. City of Kankakee, 406 Ill. 521 19

Rindge Co. v. Los Angeles County, 262 U. S. 700, 67 L. Ed. 1186, 1193 ..... 19, 22

Trustees of Schools v. Sherman Heights Corp., 20 Ill. 2d 357, 169 N. E. 2d 800 21

U. S. v. Carmack, 329 U. S. 230, 91 L. Ed. 209, 67 S. C. 252 20

Waukegan Park District v. First National Bank of Lake Forest, 22 Ill. 2d 238, 174 N. E. 2d 824 21

Zurn v. City of Chicago, 389 Ill. 114 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1411.

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Respondent,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST NO. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST NO. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST NO. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,
Petitioners,

Consolidated With

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Respondent,

vs.

JOHN PRZYWARA, ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST NO. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST NO. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST NO. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,
Petitioners.

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

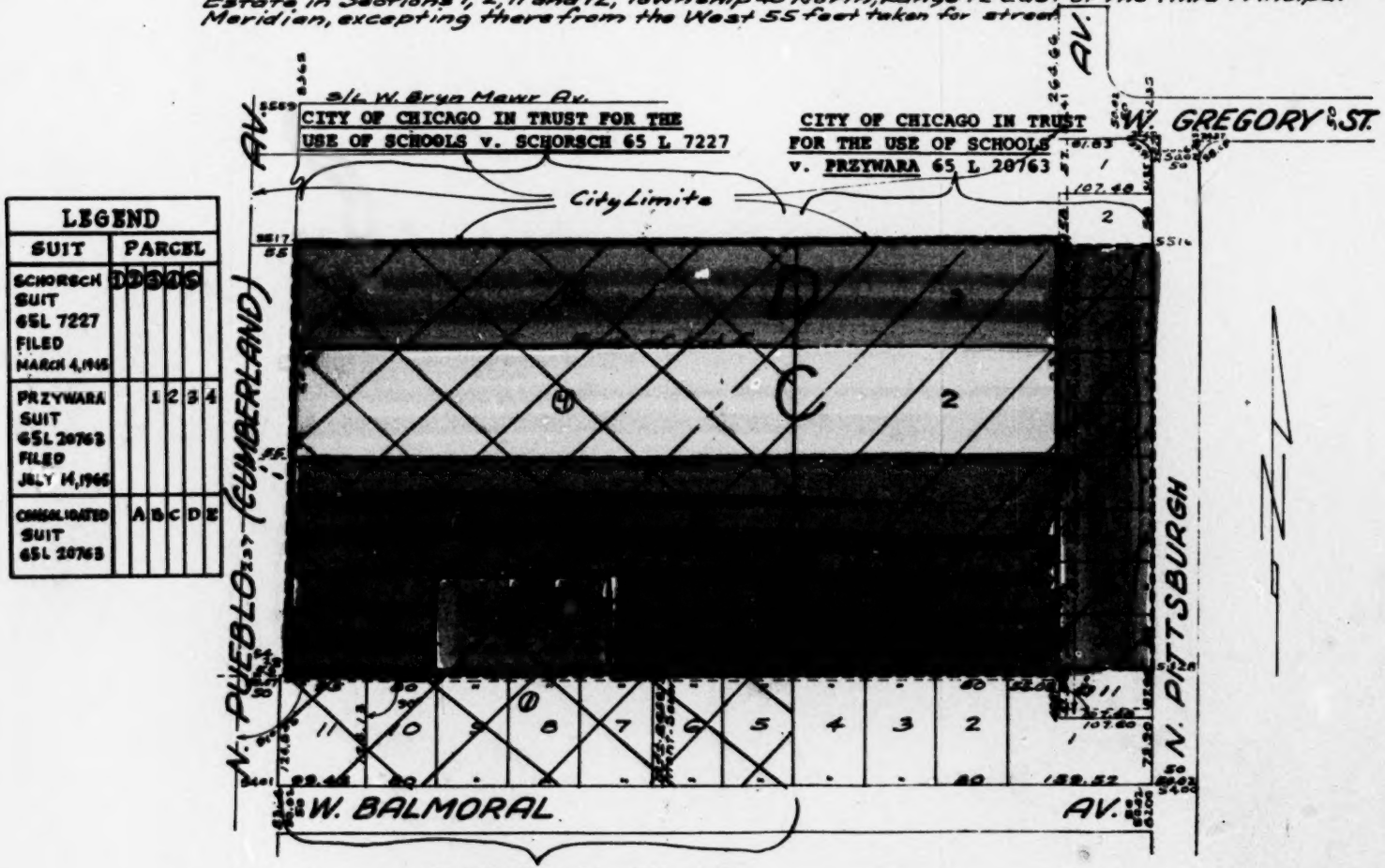
The Petition for Writ of Certiorari involves the judgments of the courts of review and trial courts of Illinois. The opinions below appended to the Petition for Writ of Certiorari involved the question of the Board of Education's right to acquire three of the five condemned parcels, B, C and D, for an elementary and high school site. (Please see map of school site on opposite page.) The very same question was also passed upon as to the fourth parcel in the site, parcel E, in a separate opinion of the Illinois Appellate Court in the same case, *City of Chicago in Trust for the Use of Schools* v. *A. J. Schorsch Realty Co.*, 95 Ill. App. 2d 264, 238 N. E. 2d 426, petition for leave to appeal to the Illinois Supreme Court denied. Said opinion is not appended to the Petition for Writ of Certiorari and we therefore append hereto a copy of that court's opinion, pp. A1-A. 15. The owner of parcel A in the school site never contested the Chicago Board of Education's right to take the property.

DATE
Apr. 15, 1965

Lots 3 to 10, inclusive, in Resubdivision of Lots 101 to 144, both inclusive, and Lot 100 (except the North 470 feet thereof) in Witwicki's 2nd Addition to Glen-Eden Estates being a Subdivision of part of the Northeast quarter of Section 11 and part of the Northwest quarter of Section 12, all in Township 40 North, Range 12, according to the plat thereof recorded April 26, 1956 as Document No. 16562104, East of the Third Principal Meridian, in Cook County, Illinois,

Also

The North 474.03 feet of the South 1054.50 feet of Lot 6 of the Subdivision of James Pennoyer's Estate in Sections 1, 2, 11 and 12, Township 40 North, Range 12 East of the Third Principal Meridian, excepting therefrom the West 55 feet taken for street.



DISMISSED AUGUST 13, 1965
7 LOTS, PARCEL D, SCHORSCH CASE

QUESTION PRESENTED.

In the absence of any showing of a substantial federal question will the Supreme Court of the United States grant Certiorari merely to review the holdings of the state courts that the Board of Education proceeded properly and in due form to acquire by condemnation the subject property for the elementary and high school site and that there was no severance damages in the case.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

There is no constitutional or statutory provision involved. No claim is made that the Eminent Domain Act of Illinois is unconstitutional.

STATEMENT OF THE CASE.

We respectfully submit the following statement of the facts as to the ownership and location of the subject property at the time the condemnation suit was filed on July 14, 1965, and the Board's determination of the location of the site for the school which determination has been upheld without exception by the Illinois Courts. The respondent makes the following statement of the case to correct inaccuracies and supply omissions in the petitioners' statement.

The Board, after considering other sites, finally determined to acquire by condemnation the five parcels making up 10½ acres as shown on the plat appended hereto necessary and required for an elementary school and a high school site in the area and thus make provision for schooling from kindergarten through twelfth grades. No charge was ever made that this school selection was made as a matter of malice, caprice or because of any ulterior motives harmful to the owners of the condemned property. Its location was never challenged.

DESCRIPTION OF PROPERTY.

The Board brought condemnation proceedings on July 14, 1965 after inability to acquire by direct purchase the 10½ acres which consisted of five parcels, A, B, C, D and E, three of which, B, C and D were unsubdivided acreage fronting on Cumberland Avenue on the west. Parcel A was also unsubdivided but had no frontage on Cumberland. The fifth, parcel E, consisted of 8 vacant inside subdivided lots fronting on North Pittsburgh Avenue on the east and adjoined parcels B, C and D on the west.

At the time the suit was filed the size and ownership of these parcels were as follows: Parcel A, one-half acre, formerly part of parcel B, improved with a brick and frame house owned by Joseph and Irene Rusek, daughter of the owner of parcel B. (Record in Case No. 54685, Add'l Abst. p. 18.) Parcel B, 4.2 acres improved with a forty year old frame house of little value owned by John and Josephine Przywara (Parents of Irene Rusek) (Record in Case No. 54685, Abst. p. 4); Parcel C, 2.3 acres vacant owned by Mitchell Kobelinski and Ted Szywala with title in Albany Park Bank, Trustee under Trust No. 11-1030 (Record in Case No. 54685, p. 518, Add'l Abst. p. 19); Parcel D, 2.3 acres with old frame house, owned by Walter and Florence Branda with title in Exchange National Bank, Trustee under Trust No. 15166 (Record in Case No. 54685, Abst. p. 7); and parcel E, being eight vacant subdivided lots each 58 feet in width and approximately 107 feet in depth owned by Edwin Witwicki with title in Western National Bank of Cicero, Trustee under Trust No. 498.

The development around the subject parcels is practically all residential.

For more than five years as a result of trials, hearings and appeals the proceedings to acquire these five parcels for school site have been in constant litigation. The Board has acquired and now has use of parcels A and E but is still awaiting the end of this pending litigation for the acquisition and use of parcels B, C and D constituting as shown on the attached plat 90% of the chosen school site.

THE BOARD OF EDUCATION DID NOT ABUSE ITS DISCRETION IN THE EMINENT DOMAIN CASE NOR WERE THE PETITIONERS PREVENTED BY THE ILLINOIS COURTS FROM PRESENTING ISSUES AND EVIDENCE BEARING ON ITS EXERCISE OF SUCH RIGHT.

Hearings on the Different Motions to Dismiss.

PARCEL E MOTION.

The first effort in the case to defeat the plan of the Board of Education to acquire the property in question was made in relation to parcel E. The owner of that parcel filed a motion to dismiss, was granted a change of venue and his attorneys, the same attorneys representing petitioners herein, began and carried on in support of said motion discovery proceedings of practically every kind. Months were spent involving court hearings, discovery actions and answering petitions and interrogatories in the trial court before Judge Donovan on the motion to dismiss the condemnation proceedings as to parcel E. The testimony of many witnesses was heard and dozens of exhibits were admitted into evidence. After hearing the testimony, examining the exhibits and hearing arguments of counsel the trial judge overruled the motions to dismiss as to parcel E and the trial on the question of compensation proceeded resulting in an award fixing just compensation. On appeal to the Appellate Court the rulings of the trial court on the motions to dismiss were affirmed as to parcel E. The opinion of the Appellate Court in this related case is not appended to the Petition for Writ of Certiorari, but we have appended a copy of it hereto. (Please see Appendix hereto at pp. A. 1 to A. 15.)

PARCEL C AND D MOTIONS BEFORE REMAND.

Subsequent to the rulings of the trial judge on the parcel E traverse the attorney who represented the owner of parcel

E also filed a motion to dismiss as to parcel C and sought leave to file another word for word identical motion to dismiss as to parcel D in the part of the case pending before a different trial judge. That trial judge was of the opinion that there was no need to again go through the extensive hearings as to parcels C and D when the same motion to dismiss was previously made on the same grounds and had been fully heard and ruled upon as to parcel E, especially since petitioners herein waited over a year after suit was filed before attempting to file the parcel C and D motions to dismiss. On motion of the Board the parcel C and D motions to dismiss were stricken and the trial on the question of compensation proceeded and resulted in a judgment fixing the amount of compensation as to parcels A, B, C and D. On appeal the ruling of the trial judge denying the motion to dismiss as to parcel E was affirmed but the court held that the owners of parcels C and D were also entitled to file and have a hearing on their motions to dismiss the condemnation suit notwithstanding the grounds of the motions were the same as those for parcel E.

HEARINGS ON MOTIONS TO DISMISS AS TO PARCELS B, C, AND D AFTER REMAND.

On remand petitioners herein continuing their resistance to the condemnation proceedings for the first time filed a motion to dismiss as to parcel B and were allowed to file amended motions as to parcels C and D. All three motions were identical and petitioners again served lengthy requests upon the Board to admit facts. These were answered and the facts given but petitioners' motions to dismiss the suit, however, were objected to by the Board as totally insufficient at law and the Board moved to strike such motions. Summarized, the motions to dismiss were based on the following grounds: (1) Preliminary plans for construction for a school or type of school were not

made; (2) The taking was excessive; (3) No reports, surveys or other basis why plaintiffs should proceed in this suit differently than in the two suits heretofore dismissed appear of record; (4) Plaintiff did not consult the Chicago Plan Commission; and (5) Plaintiff has kept from the record information which entered into its exercise of discretion in seeking to acquire the school.

After a hearing for the better part of a day the trial judge, Judge Egan, a different judge than the one who passed on the motions to dismiss in the first trial, heard extensive arguments by counsel and having before him the Board's answers to petitioners' discovery request, entered an order striking certain portions of the motions to dismiss and setting down for further hearing the balance of the motions to dismiss. At the subsequent hearing documentary evidence and oral testimony was received and the trial court after hearing the arguments of counsel overruled all petitioners' motions to dismiss. (Please see Appellate Court Opinion, Case No. 54685, Appendix to Petition for Writ of Certiorari, pp. A. 8-A. 13). The case then proceeded to trial on the matter of compensation. After judgment was entered fixing the compensation petitioners herein appealed the judgment directly to the Supreme Court of Illinois on the grounds that they did not receive "such a hearing on their motions to dismiss and their motions . . . to file a cross petition, so as to fulfill the minimal requirements of due process". In that matter the Supreme Court entered the following order in the case on November 19, 1969:

> "On this appeal from a judgment in an eminent domain proceeding appellants claim that they were denied due process of law by reason of the fact that the trial court held that certain portions of their motion to dismiss the proceedings should be stricken. It is also contended that the court erred in certain rulings concerning the value of the property.

> "There is no substantial constitutional question presented and on the Court's own motion the cause is transferred to the Appellate Court, First District."

The Appellate Court upon such transfer received the extensive briefs of the parties, heard oral arguments and affirmed the judgment of the trial court. The Appellate Court in affirming the Board's right to take the property in question cited and quoted from decisions which have long held that the matter of selecting a school site is not subject to judicial review in the absence of fraud, caprice or similar conduct none of which are charged in the case at bar. (Please see Appellate Court Opinion, Case No. 54685, appended to the Petition for Certiorari, pp. A. 8-A. 13.) Thus, the same Appellate Court that on the first appeal had ordered the hearing on the petitioners' motions to dismiss, on the second appeal affirmed the rulings of the trial court, thereby holding that the trial court had given a full hearing on the motions to dismiss as ordered on the first appeal as to parcels B, C and D.

The Petitioners' Petition for Leave to Appeal that judgment of the Appellate Court was denied by the Supreme Court of Illinois. Thereafter petitioner filed a motion in the Supreme Court to reconsider its ruling. This motion was also denied by that court.

We have pointed out the details of the litigation relating to the motions to dismiss upon which petitioners herein contend, with no support for them in the record in this case, that they have not received a hearing. As shown by the foregoing, no statement could be more incorrect and it is contradicted by the statement of the Appellate Court in its opinion (Please see Appendix to Petition for Certiorari, pp. A. 8-A. 13). The hearings which petitioners claimed herein were never afforded to them were subsequently found by the Appellate Court to have been given

to them by the trial court after the remand. Petitioners' Petition for Leave to Appeal this Appellate Court judgment was denied by the Supreme Court of Illinois.

THE ILLINOIS COURTS PROPERLY DENIED THE CLAIM OF THE PETITIONERS HEREIN THAT THEY WERE DEPRIVED OF THE RIGHT TO SEVERANCE DAMAGES SINCE THEY WERE NOT THE OWNERS OF A LARGER SINGLE TRACT THAN THAT WHICH WAS DESCRIBED IN THE CONDEMNATION SUIT.

The Claim for Severance Damage.

Petitioners' contention in their Petition, p. 10, that a portion of a tract has been taken and under the Constitution they should have received severance damages to remainder is predicated on the false premise that they were parties to an agreement which gave them an ownership interest in parcel D and which they erroneously called an "installment purchase contract". The Illinois Courts on the contrary have held consistently in these proceedings that said agreement was not an "installment purchase contract" but an option contract and that on the date of the filing the condemnation suit herein petitioners had no interest in parcel D.

In order to correct petitioners' misstatements of ownership and other erroneous statements in their petition that the condemnation proceedings at the time suit was filed involved a taking of part of a larger single tract belonging to Petitioners Kobelinski and Szywala, we submit the following facts shown by the record in the case and the pertinent provisions of the option agreement.

On November 20, 1962 and prior to the filing of the condemnation proceedings an agreement (Please see Appendix to Petition for Certiorari, p. A. 45) was entered into between the Brandas, owners of parcels C and D and

Petitioners Kobelinski and Szywala. Under the terms of that agreement Kobelinski and Szywala were given the option to purchase one-half of the property designated as parcel C in this suit and described in the agreement as the southwest one quarter of the "north 237.03 feet of the South 1054.50 feet of Lot 6 (except the West 55 feet thereof) in Subdivision of estate of James Pennoyer in Sections 1, 2, 11 and 12, Township 40 North, Range 12, East of the Third Principal Meridian, in Cook County, Illinois", by payment on or before May 1, 1963 of $30,000 with interest; and the option to purchase the other half of parcel C, the southeast one-quarter of the aforesaid legally described property by payment on or before May 1, 1964 of $30,000; and an option to purchase one-half of the property designated in this suit as parcel D and described in the agreement as the northeast one-quarter of said legally described property by payment May 1, 1965 of $30,000 and the option to purchase the other half of the property designated as parcel D in this suit and described in the agreement as the northwest one-quarter of said property by payment on May 1, 1966 of $30,000.

It was further provided by the terms of the option agreement that separate deeds and separate title insurance policies would be delivered for each of the four separate parts of the property if and when payment was made as provided in the agreement. Paragraph 13 of the agreement provides that on failure to make any such payment when due and if such default continue for 15 days beyond the due date that said default shall terminate the agreement. Petitioners herein, Kobelinski and Szywala (or the Bank Trustee holding title for them) were not obligated in any way to purchase any or all of parcel D, the unpurchased remaining real estate holding of the Brandas at the time of filing the suit (Please see Appendix to Petition p. A. 45).

At the time of the filing of the Petition to Condemn on July 14, 1965, Kobelinski and Szywala had elected to and had acquired both halves of parcel C and title thereto was held under a land trust for them by the National Bank of Albany Park. But neither of the two parts of parcel D had been paid for or acquired by them leaving parcel D still owned by the Brandas, with title in the Exchange National Bank of Chicago under Trust No. 15166. Neither Kobelinski nor Szywala, then, at the date of the filing the suit, had any interest in parcel D.

REASONS FOR DENYING THE WRIT.

A. Petitioners Have Failed to Show Constitutional or Any Other Federal Rights Were Violated by the Holdings of the Illinois Courts That There Was No Severance Damage.

In their attempt to circumvent the requirement in a case brought to the Supreme Court of the United States on Petition for Writ of Certiorari of a showing that a substantial federal question is involved petitioners have misstated facts in their statement of the case as to the fundamental question of ownership of the parcels and the location thereof and erroneously argued in their petition for certiorari, p. 10, that the condemned parcels C and D and the 5-acre tract north of D not being condemned is a tract under "unified equitable ownership" and that "since a portion of the tract has been taken" petitioners should have been entitled to severance damages for the remainder. The fallacy of that contention is first, that in their statement of the case, p. 5 of their petition, the location of the parcels is incorrectly stated in that petitioners claim the five acre tract for which they claim damages is immediately north of parcel C; second, that the petition, p. 11, erroneously characterizes the option agreement

as an "installment sales agreement". The facts are: (1) the five acre tract not taken is immediately north of parcel D, not parcel C (shown on the plat on p. 2 herein) and parcel D was not owned by the petitioners herein at the time the condemnation proceedings were instituted but on the contrary was owned by the Brandas; (2) the agreement in question is an option agreement not an "installment sales agreement" as the holders of the option were in no way required to purchase any part of the property and did not purchase parcel D or any part thereof herein prior to the date of filing condemnation suit nor until approximately two years or more thereafter. They were not bound to acquire said parcel or refrain from so doing. This court need look no further than the terms of the agreement itself set forth verbatim in the Appendix to the petition for writ of certiorari and we respectfully call the court's attention in particular to the provisions on p. 45 of the Appendix.

The Illinois Supreme, Appellate and Trial Courts found the said agreement completely clear and unambiguous and left no doubt as to the fact that the petitioners did not own parcel D at the time the condemnation suit was filed. (Please see Appellate Court Opinion, Appendix to Petition for Writ p. A. 22.) Petitioners' claim that they had the right to go on the property by virtue of the provision in the option agreement that they could make surveys or plats of subdivision, take said tests and other temporary privileges such as collecting rent from one old frame building on the property all of which was mere privilege granted. Such privilege was expressly made by the agreement subject to the exclusive and completely retained right of seller in the property except as to any part thereof actually bought and paid for by the optionee. In other words all they had was a courteous temporary privilege until they paid the purchase price.

The Courts of Illinois have decided that the petitioners' option to purchase parcel D from the Brandas did not give them legal or equitable interest in that parcel at the time of filing the condemnation petition and therefore would not support a claim for damages to other property not taken and not adjacent to parcel C.

Petitioners have failed to show that the decisions of the Illinois Courts in the case at bar have been decided in a way not in accord with the applicable decisions of this Court. There is no dispute that at the time condemnation proceedings were brought parcel C was owned by Kobelinski and his partner with title held in trust by a bank; that parcel D was owned by Walter and Florence Branda with title in trust in another bank; that petitioners herein did not acquire ownership of parcel D until two years after the suit to condemn was filed.

The Illinois Courts gave consideration to the petitioners' contention that because the owner of parcel C had an option to purchase parcel D that said owner of C had sufficient interest on which to base a claim for damages to the five acres north of parcel D and the Appellate Court held that such an option to purchase gives no interest in said parcel D following the long established rule set forth in *Keogh* v. *Peck,* 316 Ill. 318, 328, 147 N. E. 266, where the court said:

> "An option, originally, is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a time certain. *The owner does not then sell his land or any interest in it.*" (Emphasis added.)

The holder of the option could either pay for the property and acquire it or refrain from doing so as he saw fit and the agreement is therefore of a kind always held to be an option contract and not a real estate sales contract.

As the court said in *City of Chicago in Trust for the Use of Schools* v. *Blanton,* 15 Ill. 2d 198, 201, 154 N. E. 2d 242:

> "We concur in this decision. By the terms of the agreement the vendee, but not the vendors, was free to either accept the property at the stipulated price or reject it *in toto* and forfeit the paid consideration. Whether the option would at any time be exercised so as to subject vendee to the same specific performance and damage obligations as were incumbent upon the vendors, was entirely within the former's discretion. Such being the case, the so-called real-estate contract was essentially an option agreement and subject to the principles of law applicable thereto."

In line with the decisions in the above cited cases the Supreme, Appellate and Trial Courts have all consistently ruled that there is no basis for the claim of defendants in the case at bar for any damages. Petitioners nevertheless continue to claim severance damages but they fail to cite any new matters not previously argued to and rejected by Illinois Courts. They cite no pertinent cases or any other authorities but instead refer to decisions which involve present existing vested rights in land like leasehold estates (*Department of Public Works and Buildings* v. *Diel,* 89 Ill. App. 2d 130, 232 N. E. 2d 133; *Chicago and Evanston R. R. Co.* v. *Dresel,* 110 Ill. 89; *The People* v. *Shedd,* 241 Ill. 155, 89 N. E. 332; *Department of Public Works* v. *Bohne,* 415 Ill. 253, 113 N. E. 2d 319) or valid and enforceable real estate sales contracts, not option agreements (*Stevenson* v. *Loehr,* 57 Ill. 509; *City of Chicago in Trust for the Use of Schools* v. *Robertson,* 43 Ill. App. 2d 24, 198 N. E. 2d 192; *State Highway Comm.* v. *Miller,* 155 N. W. 2d 780; *South Dakota* 1968 and *Pierce County* v. *King,* 287 P. 2d 316, Washington, 1953. In *Johnson, et al.* v. *F. and M. Ry. Co.,* 111 Ill. 413, cited by petitioners herein it was conceded by the parties and so stated in the court's opinion that the adjoining property taken was owned by the defendant and cross

petitioners and adjoined other property of his, part of which was taken. The record in the case at bar on the other hand shows that petitioners had no interest in parcel D but were mere holders of an option to purchase it which the Illinois Courts always have held does not give the holder any interest in the real estate. In *Shay* v. *Penrose,* 25 Ill. 2d 447, 185 N. E. 2d 218; cited by petitioners the seller retained a right of forfeiture of the real estate in the event the buyer failed to perform his convenants including that of making the specified required payments which he was bound to make under a valid enforceable sales contract not an option agreement as in the case at bar where the buyers were not obliged to take or pay for all or any part of the property and *Shay* is therefore not relevant.

Chicago, Santa Fe and Cal. Ry. Co. v. *Ward,* 128 Ill. 349, cited by petitioners, involved the condemnation of defendant's coal yard and his existing, vested interest which the record showed he owned in adjoining property at the time condemnation proceedings were filed by recorded deeds of conveyance, recorded agreements and other documents reciting that defendants had an undivided half interest in adjoining property. There was no deed of conveyance, recorded agreement or other such document creating a vested existing interest in parcel D in the case at bar as there was in the *Ward* case. The unexercised option agreement as to parcel D gave petitioners no existing vested interest or interest of any kind in parcel D under the repeated holdings of Illinois courts in the *Keogh* and the *Blanton* cases cited above. The *Ward* case is therefore not relevant. We repeat, Petitioners cite no decision of the United States Supreme Court contrary to the holdings of the Illinois courts in the case at bar.

Petitioners argue that the Board of Education's action in the case at bar was not consistent with the 14th Amendment citing *Chicago Burlington and Quincy Railroad* v.

City of Chicago, 166 U. S. 226, 234, 235, 41 L. Ed. 979. In that case by order of the City Council of Chicago, a street was extended across railroad track right-of-way. Petitioners herein quote from the opinion of Mr. Justice Harlan to the effect that a taking of property without compensation is a denial of due process of law and contrary to the 14th Amendment and any rule of law prescribed by a court in disregard of the owner's right to compensation is likewise in violation of the Constitutional Amendment. The Board has no quarrel with such a fundamental principle of American jurisprudence but we wish to point out that the Supreme Court in *Burlington and Quincy,* contrary to petitioners' contention made in the case at bar, found there was no constitutional violation of the rights of the owner railroad. We respectfully submit it has been heretofore shown that in the instant case any possible damage to the five acre tract north of parcel D depended on whether the owner of parcel C had any ownership interest in parcel D at the time the condemnation proceedings were instituted. As we have previously shown at the time of filing the condemnation suit the Petitioners owners of parcel C merely had an option to purchase parcel D and did not own it. *Keogh* v. *Peck,* 316 Ill. 318, 328, 147 N. E. 266; *City of Chicago* v. *Blanton,* 15 Ill. 2d 198, 201, 154 N. E. 2d 242.

This is a condemnation suit to acquire five separately owned parcels of real estate in their entirety leaving no remainder on which a severance damage claim could be based. The fact the parcel C owner also owned another parcel, the five acre tract north of D not included in the taking, is no basis for severance damages since parcel C and the north five acre tract not taken were neither contiguous or jointly used but in fact were separated by the separately owned parcel D belonging to the Brandas and therefore there was no single tract in the case at bar, part

of which was taken, leaving a remainder for which severance damage could be claimed. The cases cited by petitioners, *United States* v. *Miller,* 317 U. S. 369, 87 L. Ed. 336; *United States* v. *Welch,* 217 U. S. 333, 54 L. Ed. 787, 30 S. C. 527; *United States* v. *Grizzard,* 219 U. S. 180, 55 L. Ed. 165, 31 S. C. 162; *United States* v. *Dickinson,* 331 U. S. 745, 91 L. Ed. 1789, 67 S. C. 1382 hold that when a part of a single tract is taken, the owner is entitled to recover severance damages to the remainder and are therefore irrelevant.

B. Illinois Courts Have Heard and Properly Ruled on Petitioners' Motion to Dismiss the Condemnation Proceedings and Held That the Board Could Acquire the Subject Property for a School Site. No Substantial Federal Question Exists.

The selection and acquisition of the public school site here involved was in the discretion of the Board of Education. In *City of Chicago for the Use of Schools* v. *Schorsch Realty Co.,* 95 Ill. App. 2d 264, 238 N. E. 2d 426 (Please see Appendix hereto pp. A. 1 to A. 15), the Appellate Court of Illinois upheld the determination by the Board to acquire the subject school site. The Board is the public body expressly granted by statute the power to acquire by Eminent Domain, property for public school purposes, which, it is undisputed, it resolved to do in the case at bar by official action taken at a regular meeting of the Board of Education pursuant to statute. It is undisputed that these condemnation proceedings were instituted pursuant to Board action.

It is a long established rule of law in condemnation that the exercise of the power to condemn is a legislative and not a judicial question. Among the many cases so holding is *City of Chicago* v. *Vaccarro,* 408 Ill. 587, 596, 97 N. E. 2d 766 where the court said:

"This court has held in an unbroken line of decisions that where the right to condemn exists, and the property is subject to the right of eminent domain and is being condemned for a public use, and the right to condemn is not being abused, courts cannot deny the right to condemn on the ground that the exercise of the power is unnecessary or not expedient, as the determination of that question devolves upon the legislative branch of the government and is a question which the judicial branch of the government cannot determine; and that in such cases courts may only rightfully determine whether a petitioner has the power to exercise the right of eminent domain, whether the property is subject to the right of eminent domain and is being taken for a public use, whether the power is being abused, as by the taking of an excessive amount of property, and other kindred questions which do not involve a determination of the necessity or expediency of the taking of the lands sought to be condemned. (*Poole* v. *City of Kankakee*, 406 Ill. 521; *Pittsburgh, Ft. Wayne and Chicago Railway Co.* v. *Sanitary Dist.*, 218 Ill. 286.) The general rule is that where the legislature has delegated to a corporation the authority to exercise the power of eminent domain, the corporation has also the authority to decide on the necessity for exercising the right, and its decision will be conclusive in the absence of a clear abuse of the power granted. (*Zurn* v. *City of Chicago*, 389 Ill. 114; *Illinois Iowa Power Co.* v. *Rhein*, 369 Ill. 584; *Chicago, Milwaukee and St. Paul Railway Co.* v. *Franzen*, 287 Ill. 346.)"

This court has consistently held that "The necessity for appropriating private property for public use is not a judicial question . . . . 'where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are jurisdictional questions no matter who may be charged with their decision, *and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.*'" (Emphasis added) (*Rindge Co.* v. *Los*

Angeles County, 262 U. S. 700, 67 L. Ed. 1186, 1193). To the same effect is *U. S.* v. *Carmack,* 329 U. S. 230, 91 L. Ed. 209, 67 S. C. 252.

We repeat that no statement or evidence was ever brought into this case that the Board of Education's selection of the subject parcels for a school site was not an excellent choice to meet the needs of the community it will serve.

The Board directly and amply proved its right to take the property when challenged by petitioners' motions to dismiss herein and petitioners were given full opportunity and complete hearing to present all applicable evidence offered by them. In our statement of the case we have pointed out for the court's consideration the facts regarding the Board's efforts over the last six years to acquire these parcels and we respectfully submit that the courts of Illinois properly ruled in upholding the right of the Board to put public schools on these parcels. Notwithstanding the judgments of the Illinois Trial, Appellate and Supreme Courts in the case at bar, the petitioners here argue that where there are questions as to the sufficiency of Eminent Domain proceedings or the authority to condemn, the burden of proof is upon the taking body to make prima facie proof of the disputed averments, citing *U. S.* v. *Nudelman,* 104 F. 2d 549, 551; *Board of Trustees of Southern Illinois University* v. *Lange,* 28 Ill. 2d 229, 190 N. E. 2d 789, 790; *Board of Education* v. *City of Chicago,* 402 Ill. 291, 83 N. E. 2d 714. In the *Lange* and *Board of Education* cases, the condemning bodies put in no proof whatsoever to make out prima facie cases when objection was made by traverse or motion to dismiss.

The situation in the case at bar is different. There not only was in evidence the Board's answers to interrogatories regarding the steps taken by it to select the school site but also the adopted Resolution of the School Board

reciting the necessity of the taking of the parcels in question and its judgment to condemn same and also oral evidence by the Board of Education's Assistant in Charge of School Facilities Planning (Please see Case No. 54685, Record p. 1082; Abst. p. 122) regarding the selection and necessity of the parcels for use for grammar and high school site. The Board's Resolution itself which was offered by it and admitted into evidence without objection established a prima facie case for the necessity of the taking under the long established rule in Illinois that a prima facie case is made out for the necessity of the taking by the introduction of the ordinances of the condemning body. *Waukegan Park District* v. *First National Bank of Lake Forest,* 22 Ill. 2d 238, 174 N. E. 2d 824; *Deerfield Park District* v. *Development Corp.,* 22 Ill. 2d 132, 174 N. E. 2d 850; *Trustees of Schools* v. *Sherman Heights Corp.,* 20 Ill. 2d 357, 169 N. E. 2d 800. Not one word of evidence was offered by the petitioners to controvert the evidence of witnesses or action of the Board on this subject.

The *Nudelman* case cited by petitioner had nothing to do with the point for which petitioners cite it, as it merely held that a trial court in exercising its discretion may, after a reasonable period of time given for filing same, bar the filing of motions to dismiss condemnation proceedings.

In the case at bar when after a hearing defendants' motions to dismiss were denied, counsel for the defendants made an oral perfunctory motion for leave to amend their motions to dismiss which motion was denied by the trial judge. The Appellate Court (Appendix to Petition, p. A. 13) properly found that the denial of the motion to amend was within the Trial Court's discretion and there had been no abuse of its discretion, especially since the motion to amend came after a full hearing on the petitioners' motions to dismiss and the defendants failed to disclose any additional grounds which would have served as a basis for up-

holding the motions to dismiss. Petitioners also cite *United States* v. *Carmack*, 329 U. S. 230, 243, 245, 91 L. Ed. 209, 67 S. C. 252 which involved the taking by the federal government of municipally owned property for the Post Office. In that case one of the descendants of the original grantors of the property for public use appeared in the case objecting to the taking of the property, claiming it was destructive of the public use for which it had been dedicated by her ancestors. The Supreme Court adhered to the principle of the supremacy of a federal public use over all other uses and held that the power to select sites for the public Post Office facility rested with Congress and its agencies and that its determination on a site was not subject to a judicial review, saying at page 218: "The judgment exercised by the designated officials in selecting this site out of 22 sites suggested, and out of two closely balanced alternatives, constituted an administrative and *legislative decision not subject to judicial review on its merits.*" (Emphasis added.)

This court has consistently held as shown by its decision in *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 67 L. Ed. 1186, 1193, heretofore cited that a hearing on the question of necessity of a taking as petitioners herein contend they were denied is not essential to due process in the sense of the 14th Amendment. Thus all petitioners really seek in this case is judicial review of the Board's decision to acquire the subject property for a school. This court in *Carmack* expressly ruled contrary to such contention and held that site selection is not subject of judicial review.

Petitioners also argue that the Board failed to make known its reasons for choosing the subject property in its present size and shape for a school site and this failure was denial of due process to them. It is a long established rule that the reasons or motives behind the determination of public bodies such as the Board are not the proper sub-

ject of judicial investigation as held in *Detroit United Railway* v. *City of Detroit,* 255 U. S. 171, 178, 65 L. Ed. 570, 576; *Soon Hing* v. *Crowley,* 113 U. S. 703, 710, 28 L. Ed. 1145.

CONCLUSION.

We respectfully submit that the Illinois Courts have correctly held the Board may acquire the subject property for a needed school site and that there is no severance damage. The petition fails to set forth a federal question of substance and for the above and foregoing reasons the petition should be denied.

Respectfully submitted,

JAMES W. COFFEY,
FRANK S. RIGHEIMER,
228 North La Salle Street,
Chicago, Illinois 60601,
Attorneys for Petitioner.

FRANK S. RIGHEIMER,
RICHARD E. GIRARD,
Of Counsel.

APPENDIX.

OPINION OF THE APPELLATE COURT
CASE NO. 51674

City of Chicago in Trust for the Use of Schools, Petitioner-Appellant v. Albert J. Schorsch Realty Company, Inc., et al., Defendants,

Consolidated With

City of Chicago in Trust for the Use of Schools, Petitioner-Appellant v. John Przywara, et al., Defendants-Appellees, Western National Bank of Cicero, etc., Defendant-Appellee.

Gen. No. 51,674.
First District, Fourth Division.
April 10, 1968.
Rehearing denied May 22, 1968.

Petitioner in eminent domain proceedings appeals from a jury award and judgment of $97,440 in favor of the owner of Parcel E—Western National Bank of Cicero, as Trustee under Trust No. 498. Defendant cross appeals from the denial of its motion to dismiss the complaint.

Petition instituted condemnation proceedings on March 4, 1965 (Circuit Court No. 65 L 7227) for five parcels of land to be used for school purposes. On July 14, 1965, another petition was filed in the same case seeking nine and one-half acres of unsubdivided land and one acre of subdivided property which consisted of eight lots designated as Parcel 4 and also referred to as Parcel E. On July 14, 1965,

another petition was filed in a new case (Circuit Court No. 65 L 20763) seeking the same property. In that case a change of venue was granted on November 3, 1965, as to Parcel 4, and the case reassigned for a separate trial as to Parcel 4. Thereafter the cases were consolidated.

This appeal by petitioner and the cross appeal of Western National Bank of Cicero as Trustee under Trust No. 498 (hereinafter referred to as defendant) emanates from the proceedings in the separate trial as to Parcel 4—also referred to as Parcel E.

In the consolidated case petitioner sought to condemn ten and one-half acres of land located in the vicinity of O'Hare Airport bounded by Cumberland Avenue on the west and Pittsburgh Avenue on the east. Balmoral Avenue was to the south and the city limits (close to Bryn Mawr Avenue) were the northern boundary. Defendant's eight lots fronted on Pittsburgh Avenue each with 58-foot frontage and a depth of 107.48 feet. The evidence showed that the property was zoned R-2, single-family residence, and each lot in the subdivision bore a covenant restricting it to such use.

On appeal petitioner's principal contention is that the conduct of defense counsel in closing argument was so prejudicial as to deny petitioner a fair trial.

Petitioner's Evidence

Herman O. Walther testified that he was a real estate appraiser with extensive experience and that he had taught real estate appraising. He said that there were many other areas in the City of Chicago still being developed for houses and that in the immediate vicinity of the subject property, just west of Cumberland Avenue, there were 100 vacant acres and three and one-half miles east of Pittsburgh Avenue there was an only partially developed new

home area. He stated that the highest and best use of the eight lots was for single-family residences and that each lot was worth $8,000.

Albert J. Schorsch, Jr. testified under subpoena. He stated that he and his family had been developing property in the area for about ten years, that eighteen months earlier one of the companies in which he and his family were involved sold a lot on the corner of Pittsburgh and Balmoral to another of the Schorsch companies for $9,000 and that this was not an arm's length transaction. He said that the lot was 60 feet wide and 124 feet deep but that the trend was toward building houses on lots 50 feet wide.

Raymond Cleveland stated that he was a real estate broker and that he had recently participated in the sale of a property 48 feet wide and 141 feet deep and within one-half mile of the subject property for the price of $7,500. He said that the lot fronted on Cumberland Avenue across the street from a large shopping center and three or four lots away from a gas station and that the houses in that area sold for between twenty and thirty thousand dollars.

Edwin J. Feulner testified that he was a broker, manager and appraiser of real estate and that he was familiar with the area of the subject property. He said that the highest and best use of the eight lots was R-2 single-family residences and that as such they were worth $140 per front foot ($8,120 for 58-foot frontage).

DEFENDANT'S EVIDENCE

Albert Schorsch, Jr. (who had also been called as a witness by petitioner) testified that his organizations were in competition with defendants and owned the property immediately south of defendant's subdivision. He said that the highest and best use of the subject property would be under R-3 general residence zoning. He then testified:

Under R-3 zoning you might be able to build one flat on each parcel of 2,500 square feet and on a lot 46½, maybe slightly larger than this, you could build a two flat. You could get nine total units out of that group of 8 lots and if you took into consideration the ownership of adjacent lots you could get 10 lots because all you need is one more front foot to make the 10th lot. I have an opinion of the fair cash market value of 10 such units as of July 15, 1965. I believe each of the units 46½ x 107.48, that each parcel that size would be worth $11,000 which works out to be $220—$225 a front foot. My opinion is the same if the zoning remains the same.

Frank Syms testified that he was an appraiser, broker, manager and financier of land transactions; that an area of land to the east of the subject property separated by one vacant parcel and Pittsburgh Avenue had been developed with homes ranging in value from $30,000 to $45,000 by the Schorsch interests, James C. Moreland and Son and the beneficial owners of the subject property and that there is a relationship between the value of vacant and improved property. He said that the highest and best use was for single-family residences and that each lot would have a value of $10,400 or $179 per front foot or a total of $83,200 for the eight lots. He stated that there was a scarcity of comparable sales because most developers sold property with houses as a complete package.

William F. Moreland stated that he was a broker and developer and was president of the company of James C. Moreland and Son which had developed property in the area. He testified that the highest and best use was single-family residences, that the fair cash value of the eight lots depended on whether their sale was separate or bulk, that the fair cash value was $11,000 to $14,000 per lot or $200 to $225 per front foot.

Raymond Peterson said that he was a builder and subdivider, that he was involved in a sale within a mile of the

subject property, the price was $251.87 per front foot for five lots, all of which were 125 feet deep and four of which were 25 feet wide with the fifth being 38 feet wide. He said there was no longer any vacant property in the immediate area of that sale. He testified that the highest and best use of the subject property was for single-family residences and that the fair cash value for the eight lots would be approximately $11,000 per lot or $220 to $225 per front foot. He admitted on cross-examination that he never walked around the subject property or bought or sold property within two or three blocks of it but that he had only driven by it.

OPINION

[1] Petitioner contends that prejudicial conduct of defense counsel in his closing argument so confused and prejudiced the jury that it was denied a fair trial. Walther testified that the eight lots were worth $8,000 per lot. Defense counsel argued to the jury that viewing Walther's testimony of $8,000 per lot with that of witnesses who testified to the possibility of making ten lots out of the property, that "even using Mr. Walther's valuation, the overall picture is $80,000 for this whole parcel." Walther never testified to what the lots would be worth if subdivided into ten smaller lots. Counsel used the same method in discussing the testimony of Feulner, Syms and Peterson who all valued the eight lots as then subdivided.

Petitioner also complains that counsel's argument that property which was sold on Cumberland was not comparable to the subject property because Cumberland is a "... high speed street with a rumble strip," was not based on any evidence in the case. The same is said of the argument that the jury should consider the difficulty of defendant's getting new land to continue this construction and

development business. Finally, complaint is made of a personal attack on petitioner's counsel.

Defendant, however, argues that the alleged errors are not properly preserved for review. The record shows that not one of the remarks complained of was objected to at the trial. In County of Cook v. Colonial Oil Corp., 15 Ill2d 67, 153 NE2d 844, the court said at page 75:

> Counsel for defendant also characterizes the closing argument of petitioner's counsel as "unfair, insulting, full of ridicule of respondent's witnesses and counsel, and so insinuating and vindictive as to be highly prejudicial to the respondent." First of all, counsel for defendant, who is admittedly experienced in condemnation, made no objection to any of the opening argument of counsel for petitioner and no objection to any of the supposedly objectionable remarks made by petitioner's counsel in his final argument. We have consistently held that experienced counsel cannot take a chance of failing to make objections and then, upon receiving what they consider an adverse jury verdict, claim error. (City of Chicago v. Vaccarro, 408 Ill 587.)

Furthermore, in its post-trial motion the petitioners said only: "The petitioner was prejudiced by the argument made by counsel for defendant to the jury." Illinois Revised Statutes, 1963, c 110, § 68.1, requires that the post-trial motion "contain the points relied upon, *particularly specifying* the grounds in support thereof. . . . A party may not urge as error on review of the ruling on his post-trial motion any point, ground or relief not particularly specified in the motion." (Emphasis supplied.) In Kortlander v. Chicago Transit Authority, 56 Ill App2d 48, 205 NE2d 516, it was held that unless the allegedly improper remarks were specifically set forth in the post-trial motion, no objection could be raised to them on appeal. See Lawler v. Pepper Const. Co., 33 Ill App2d 188, 178 NE2d 687; Perez v. B. & O. R. Co., Ill App2d

204, 164 NE2d 209; Richman Chemical Co. v. Lowenthal, 16 Ill App2d 568, 149 NE2d 351.

In the instant case the verdict was "within the range of the evidence." Chicago Land Clearance Commission v. Darrow, 12 Ill2d 365, 146 NE2d 1. There was evidence that that eight lots were worth $11,000 to $14,000 per lot and that the 464 feet were worth between $200 and $225 per front foot. In fact, in discussing the post-trial motion the trial judge said:

> There isn't any question that this jury valued this property, 464 feet at $210 a foot, which multiplied comes out to $97,440 to the penny. I don't think they ever considered it as ten sites as such. If they did, they would have come out with $9,744 a building site, and juries don't do that.
>
> In my opinion, this verdict is within the realm of the evidence, and I don't think there is, as far as I am able to observe—and I don't think there is any error in the record.

In view of petitioner's uniform failure both to object at the trial and to specify in the post-trial motion, and since the verdict is within the range of the evidence, the judgment is affirmed.

CROSS-APPEAL

Defendant contends in its cross-appeal that its motion to dismiss should have been sustained because (1) the taking was an abuse of the School Board's power in that the proposed site for school purposes was in a flight zone for aircraft using O'Hare Field, and (2) the statutory prerequisites wre not fulfilled.

HEARING ON TRAVERSE AND DEFENDANTS' MOTION TO DISMISS

DEFENDANT'S EVIDENCE

Saul Samuels was called by defendant under section 60[1] and testified that he knew of no schools built within a flight zone in the last four years but that he did not have sufficient information to say that none was built.

Francis B. McKeag, assistant superintendent of schools, testified under section 60 that there would eventually be plans for a school on the site although he did not feel there then existed any specific plans. He said, "We will serve a ¾ mile radius from this location in all directions so far as Kindergarten through 6th grade is concerned. 1¼ miles as far as 7th and 8th grades are concerned and when a high school is placed on this location it would serve a 1½ mile radius." He stated that the northern boundary of the proposed school site was also the northern boundary of the City of Chicago, that due to the inadequacy of present facilities the Board of Education was forced to pay tuition fees for 120 students from this area to another school system and that this school system had told the board last spring that it would no longer have room for these students. He admitted, however, on cross-examination that a report of the General Superintendent of Schools said that the school in District 1, the district here involved, were capable of receiving more students.

Joseph P. McMahon, assistant real estate agent of the Board of Education, testified under section 60 that he was visited by defendant's lawyer; that he did not know whether the lawyer came in response to the letter containing the offer of purchase; that the lawyer did not present the letter; that he did not tell the lawyer what the offer

1. Ill Rev Stats, 1963, c 110, § 60.

was; that the lawyer only stated that his people were not happy about it and that he told the lawyer that he (McMahon) had no authority to change the offer.

John Duba, Commissioner of Development and Planning, testified that the Chicago Plan Commission was not consulted on this project.

PETITIONER'S EVIDENCE

Francis B. McKeag testified that because of the decision of the Pennoyer School Board to stop receiving the 120 students from this area, the Chicago Board of Education was forced to place four mobile classrooms on the corner of Balmoral and Cumberland. He said that in the last ten years the city had annexed a considerable amount of territory requiring the acquisition of a school site in the general area.

Frank G. Lappas testified that he was an aeronautical consultant with a degree in civil engineering, that he had been a consultant to companies throughout the nation on matters pertaining to air hazards as well as to property owners planning on the use of land in the vicinity of airports, that he had appeared before the Federal Aviation Agency on numerous occasions, that he had studied the rules and regulations of various bodies having to do with airports throughout the country, and that he was familiar with O'Hare. He stated that there were a variety of safety zones around airfields and that this property was within O'Hare's instrument approach zone but not within the control zone. He said that the subject property was 15,000 feet from the end of the runway and 1,400 feet off the extended center line of the runway and that a two-story building would constitute no hazard and violate no pertinent regulations he knew of.

OPINION

[2, 3] In its cross-appeal defendant first contends that the taking is an abuse of power and the petition should have been dismissed. The general rule is stated in Trustees of Schools of Township 37 North, Range II, Cook County v. Sherman Heights Corp., 20 Ill2d 357, 169 NE2d 800, at page 360:

> The question of necessity for taking by eminent domain for public use is legislative and its determination is within the discretion of the corporate body vested with the power to exercise the right. [Cases omitted.] Such a determination will be disturbed by the courts only where there has been an abuse of power violative of constitutional rights. [Cases omitted.]

Petitioner introduced testimony that ten years of annexation by the City of Chicago had created the need for new school facilities in the area, first met by paying tuition for 120 students in the schools of a nearby community and later by the erection of four mobile classrooms. Defendant, however, says that the school board abused its power in attempting to construct a school in what it terms the "flight zone" around O'Hare Airport when such action is expressly disapproved by the zoning regulations for the Chicago-O'Hare International Airport. Section 2 of these provisions provides:

> Land Use Restriction Zone—In that portion of the approach zone at each end of each instrument and non-instrument runway as indicated on the zoning map, is hereby established an area hereinafter referred to as the land use restriction zone. The land use restriction zone shall have a width of 1,000 feet at a point 200 feet from the end of each runway widening thereafter uniformly to a width of 4,000 feet at *a distance of 10,200 feet* from the end of each

> runway. Any land use established within the land use restriction zone subsequent to the effective date of these zoning regulations shall be subject to the control of the affected political subdivision. To the extent where feasible, such political subdivision shall discourage further development of residential buildings and places of public assembly involving educational, institutional, amusement, and recreational uses. [Emphasis added.]

The evidence shows that the subject property is 15,000 feet from the end of the runway and therefore outside the land use restriction zone. Moreover, the only testimony on the actual hazards involved was given by petitioner's witness Lappas, an aeronautical consultant, who stated that the placement of a school on the subject property would not constitute a safety hazard and would not violate any regulations he knew of.

[4, 5] Defendant also argues that petitioner voluntarily dismissed two prior suits to condemn nearby property because that property was in a "flight zone." Defendant claims that it relied on these actions to its detriment and that petitioner is therefore estopped from taking the subfeet property citing Hickey v. Illinois Cent. R. Co., 35 Ill2d 427, 220 NE2d 415. Defendant produced a document purporting to be a recommendation of the General Superintendent of Schools that one of the condemnation suits be dismissed because the property to be condemned was in a flight zone. However, there was no evidence whatsoever as to the reason for the dismissal of the other suit. Furthermore, there was no evidence defining a "flight zone" or showing that the subject property in the instant case was within it.[2] Finally, defendant failed to show that the ex-

2. The only evidence identifying and explaining the different zones that surround an airport was provided by petitioner's expert, Frank Lappas. He said the "instrument approach zone" was 500 feet on each side of an extended center line of a runway projecting

penditures it made in improving the property in reliance on these dismissals will not be reflected in the property's value and will be lost to it. In these circumstances we find no basis for the conclusion that petitioner is estopped from taking the subject property. See generally Chicago, St. L. & W. R. Co. v. Gates, 120 Ill 86, 11 NE 527.

Defendants' second contention in their cross-appeal is that petitioner failed to fulfill conditions precedent to the filing of condemnation proceedings. First, defendant argues that there was no good faith attempt on the part of petitioner to negotiate with the landowners and no refusal on their part to agree on a valuation. The general superintendent of Chicago schools sent defendant a letter making an offer of $40,000 for the property. The letter stated that the general superintendent had been empowered by the School Board to negotiate but that if discussion was desired Mr. Fred Arnholt of the Board of Education should be contacted first. Defendants produced evidence only that their lawyer talked to Joseph McMahon of the Board of Education's real estate office, but that he made no counter offer and no request to discuss this with the Superintendent. The lawyer merely said his clients were dissatisfied with the offer, to which Mr. McMahon replied that he had no authority to change it. We believe there was sufficient offer and attempt to negotiate. See County Board of School Trustees of Macon County v. Batchelder, 7 Ill2d 178, 130 NE2d 175; County of Mercer v. Wolff, 237 Ill 74, 86 NE 708.

[6] Defendant also contends that the School Board's failure to contact the Chicago Plan Commission before it sought to condemn prevents a valid condemnation. Illinois

---

out to 50,000 feet at which point the width of the zone was 16,000 feet and that the subject property fell within this zone. He mentioned but did not define the "non-instrument approach zone." Adjacent to the two zones are "transitional zones." Lappas also stated that there were conical surfaces and outer conical surfaces. He did not testify that any of these above were hazard zones, nor did he mention the term "flight zone."

Revised Statutes, 1965, chapter 24, section 11-12-4.1, reads as follows:

> Whenever a municipality of more than 500,000 population has created a plan commission pursuant to the provisions of this Division 12, every plan, design or other proposal by any public body or agency which requires the acquisition or disposition of real property within the territorial limits of the municipalty by any public body or agency, . . . shall be referred to the plan commission by such public body or agency not less than 30 days prior to any election for the purpose of authorizing the borrowing of money for, or any action by such public body or agency to appropriate funds for, or to authorize such changes or the acquisition or disposition of such real property, but in no event shall such referral be less than 30 days prior to making such changes or acquiring or disposing of such real property. The plan commission shall review every such plan, design or other proposal and shall within 30 days after submission thereof report to the public body or agency having jurisdiction over such real property or improvement thereon concerning the conformity of the plan, design, or other proposal with the long range planning objectives of the municipality and with the official plan for the municipality or any part thereof if the same shall then be in effect as provided in Section 11-12-2. Such report shall be spread of record in the minutes or record of proceedings of such public body or agency. A report that any such plan, design, or other propoasl is not in conformity with the long range planning objectives of the municipality, or the official plan for the municipality shall be accompanied by a written statement of the respects in which such conformity is lacking but such a report shall not bar the public body or agency having jurisdiction over such real property or improvement thereon from thereafter making such changes or acquiring or disposing of such real property. . . .

The statute expressly provides that the plan commission's disapproval does not bar the proposed action. We believe

that the statute taken as a whole indicates that the requirement of submission to the plan commission is not mandatory and failure to submit the proposed action to the commission does not bar condemnation.

[7, 8] Defendant asserts the court erred in sustaining petitioner's objections to an interrogatory requesting a list of all persons who were directed by the board to inspect the property. The petitioner claimed that the names were privileged and not subject to disclosure relying on Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill2d 431, 143 NE2d 40 which held that the reports of appraisers were privileged. However, we believe that under the broad discovery principles of Monier v. Chamberlain, 35 Ill2d 351, 221 NE2d 410, the names of appraisers are not privileged. Nevertheless, under the circumstances we deem this to have been a harmless error.

[9, 10] Defendant also contends that errors were committed in the pretrial discovery proceedings with regard to the disposition of six answers to defendant's notice to admit facts. Petitioner responded to the questions by denying knowledge sufficient to answer the questions and at the same time asserting that they were irrelevant and immaterial. Defendant complains that its motion to strike those parts of petitioner's answers asserting that the questions were irrelevant and immaterial was erroneously denied. Supreme Court Rule 216, Illinois Revised Statutes, 1965, chapter 110A, section 216, formerly Rule 18, requires that the questions be either answered or objected to or that a explanation of why they cannot be answered must be given. Petitioner should not have been able to both answer and object simultaneously to the same matter. The motion to strike those portions of the answers which amounted to objections should have been granted. However, this error could not prejudice defendant and cannot be the basis of a reversal.

[11] Defendant also urges that those portions of the answers asserting inability to answer were specious and not made in good faith and that denial of its motion that petitioner be deemed to have admitted answers favoring the movant was error. We sympathize with petitioner's inability to answer some of the these questions because the maps provided by defendant fail to show what defendant asserted they showed and did not contain the material necessary to answer the questions. Furthermore, failure to deem these answers admissions could not have substantially prejudiced defendant's case. Some of the questions dealt with whether the subject property and other property which had been the subject of condemnation suits were within an instrument approach zone within the meaning of the 1965 Revised Code of Federal Regulations, Title 14, c 1, § 77-27. The evidence ultimately showed that these properties were within the zone. Thus failure to deem these facts as admitted could have had no prejudcial effect. See Braswell v. New York, C. & St. L. R. Co., 60 Ill App2d 120, 208 NE2d 358. Moreover, section 77-27 does not characterize these zones as hazard zones and has no bearing on the case. (Section 77.23 entitled "Standards for Determining Obstructions" defines hazard areas. There was no showing that this property was within a hazardous area either under section 77.23 or the O'Hare Zoning Regulation, supra.) The remaining questions were also substantially answered by the evidence but again failed to have any significant bearing on important issues in the case. Failure to deem these answers admissions was not reversible error.

Finally, we find no error in the trial court's refusal to direct an answer to a question propounded during a discovery deposition.

In view of the foregoing, the judgment of the Circuit Court is affirmed.

Affirmed.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 16 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1411

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners,

Consolidated with

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

JOHN PRZYWARA, ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners.

REPLY BRIEF.

JOHN B. MURNIGHAN,
GREEN, MURNIGHAN & KANE ASSOCIATES,
228 North LaSalle Street,
ST 2-0293,
Chicago, Illinois 60601,
Attorney for Petitioners, National Bank of Albany Park in Chicago, as Trustee Under Trust No. 11-1030, Individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee Under Trust No. 15166; and La Salle National Bank of Chicago, as Trustee Under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, His Wife.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1411.

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

ALBERT J. SCHORSCH REALTY CO., INC., ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners,

Consolidated with

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,

vs.

JOHN PRZYWARA, ET AL.,

NATIONAL BANK OF ALBANY PARK IN CHICAGO, AS TRUSTEE UNDER TRUST No. 11-1030, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO EXCHANGE NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST No. 15166; AND LA SALLE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST No. 35232, SUCCESSOR IN INTEREST TO JOHN PRZYWARA AND JOSEPHINE PRZYWARA, HIS WIFE,

Petitioners.

REPLY BRIEF.

Now come the petitioners, who respectfully pray a writ of certiorari issue in this cause and, to the new matters raised by respondent, Board of Education of the City of Chicago in its answer, reply as follows:

I. TRANSFER ORDER DOES NOT WAIVE CONSTITUTIONAL ISSUE.

Respondent Board, commencing on page 8 of its answer, refers to a transfer order by the Supreme Court of Illinois of these petitioners' initial appeal from the trial court, inferring such transfer order constituted a ruling that no constitutional issues were involved in this case. Such transfer order was made under the Illinois Supreme Court Rule 365 (formerly Rule 28-1) which specifically provides:

> "Effect. The taking of an appeal to either the Supreme Court or the Appellate Court shall not be deemed a waiver of the right to present any issue to the appropriate court. A matter decided by either court shall not be subject to collateral attack on the ground that it should have been decided by the other."

Ill. Rev. Stat. (Ill. Bar Assoc. Ed. 1969), Chap. 110 A, Sec. 365 (A). The Illinois Supreme Court under this rule transfers to the Appellate Court any case which it feels does not involve a constitutional question of broad general interest.

II. PETITIONERS WERE ADJUDGED ENTITLED TO A HEARING ON MOTIONS.

Initially respondent Board claims that the same issue in Petitioners' motions to dismiss has been decided in this case, involving different property and different defendants who raised the same motions through the same attorney before a different trial judge in which there was a full hearing. The same contentions were presented to the Appellate Court by respondent Board when it first appealed in this instant case (App. A-2; case number 51710). The court there said (p. A-5):

> "We know of no 'well established law in Illinois' which prevents owners of property from challenging the

condemnor's right to proceed simply because they make the same arguments through the same attorneys as were made by another party in a different suit tried by a different judge. Certainly the fact that different properties and different parties were involved prevents the application of the principal of res adjudicata. We believe that defendants were entitled to a hearing on the petitioner's right to condemn."

III. CALIFORNIA LAW DOES NOT APPLY.

Respondent Board then, attempts substantially to contend that the law is clear there is no necessity for a hearing, citing *Rindge Company, et al.* v. *County of Los Angeles,* 262 U. S. 700, involving a condemnation by the County of Los Angeles, California under its peculiar statute which this court clearly distinguished, where it said on page 702 of 262 U. S.:

> "Section 1241, as amended in 1913, provides that before property can be taken it must appear that the use to which it is to be applied is one authorized by law and that the taking is necessary to such use; provided, inter alia, that when the legislative body of a county has by resolution adopted by vote of two-thirds of its members, found and determined that the public interest and necessity require the construction by the county of any proposed public improvement located within its limits and that designated property is necessary therefor, such resolution shall be 'conclusive evidence' of the public necessity for such improvement, that such property is necessary therefor, and that such improvement is located in the manner most compatible with the greatest public good and the least private injury. Stats. 1913, p. 549."

The law in Illinois is clear that an owner is entitled to a hearing at some stage of the court proceedings. The procedure in Illinois as quoted on page 19 of Respondent Board's answer in the case of *City of Chicago* v. *Vacarro,* 408 Ill. 587, 596, 97 N. E. 2d 766, is:

> "The courts have the right to determine whether the power to take property for a public use is being abused."

No such conclusive evidence obtains in Illinois as is provided for in California practice. Petitioners respectfully submit that they have contended at all stages of these proceedings that respondent Board has abused its discretion and that petitioners are entitled to a hearing thereon.

IV. PETITIONER WAS OWNER BY VIRTUE OF EQUITABLE CONVERSION.

The second issue petitioners present to this court was whether petitioners had been deprived of just compensation within the meaning of the Fourteenth Amendment when they were prevented by Illinois courts from presenting the issue of severance damages to a jury. The substance of the only answer given by respondent Board is that, petitioners-landowners only had an option since the November, 1962 agreement (Sep. App. pgs. 40-45) under which they were purchasing contained a liquidated damages clause. Respondent Board completely disregards all other parts of this agreement. Even if the liquidated damages clause causes this agreement to be considered solely an option, under applicable Illinois law the option must be considered to be exercised for eminent domain purposes.

Respondent Board cites two Illinois cases to sustain its claim the November 1962 agreement is an option. Only one is an eminent domain case, *City of Chicago* v. *Blanton*, 15 Ill. 2d 198, 154 N. E. 2d 242 (1958), and that involves only a valuation problem, not severance damages, where:

> "An executed contract to purchase property being condemned which provided that vendee had the option within a year to rescind the contract to purchase and forfeit as liquidated damages a certain initial payment was no more than an option to purchase and not ad-

> missible to show market value where other sales evidence had been introduced." Eminent Domain in Illinois, Righeimer & Righeimer, pg. 46 (1962).

The Illinois Appellate Court in its opinion (#54685, A. 21) considered the November 1962 agreement's liquidated damages clause as making the agreement an option and cited *Keogh* v. *Peck,* 316 Il. 318 (1925) for the proposition that no interest in land is created in the holder of an option by an option agreement.

That is *not* the law in Illinois. The basis for that proposition is found at pg. 332 of the *Keogh* case where *Gall* v. *Stoll,* 259 Ill. 174, 180 (1913) is cited. *Gall* v. *Stoll* at page 180 relies on *Chappell* v. *Knight,* 108 Ill. 570, and *Walters* v. *Walters,* 132 Ill. 467, *inter alia.* The Illinois Supreme Court said in 1962:

> "While the Chappell case was one at law (ejectment) and therefore the equitable doctrine did not apply, nevertheless, it was cited with approval in some subsequent equity cases. (See e.g., Walters v. Walters, 132 Ill. 467, 23 N. E. 1120; Gall v. Stoll, 259 Ill. 174, 102 N. E. 225.) We believe the correct view to be that expressed in the majority of the cases which hold equitable conversion takes place at the instant a valid and enforceable contract is entered into and that the buyer at that time acquires an equitable title. To the extent that the Chappell case and those following it are inconsistent with this view they are hereby expressly overruled."

Shay v. *Penrose,* 25 Ill. 2d 447, 185 N. E. 2d 218, 220 (1962). Petitioner here thus stands in the position of being denied severance damages as a result of the Illinois court's ruling based on a principle which has long been discarded.

It is logically inconsistent for respondent Board to argue, on one hand that this is only one unified site and, on the other, nothing outside of the property lines of an individual parcel has any effect on the owner's rights thereto.

V. CONCLUSION.

In conclusion, we respectfully submit that the two issues presented to the court herein involve substantial constitutional questions. No hearing was afforded these defendants under the circumstances of this case after the cause was remanded for such purpose. The second issue presented is that petitioners were denied any severance damages to the property remaining after the taking herein. Petitioner has been denied any right to damages on a principle of law which has been specifically overruled. Further, respondent Board's argument that the agreement is only an option is refuted by its sales features, the number of rights given the purchasers, and the fact conveyances had already occurred pursuant to its terms. Even if it is an option, it must be considered under Illinois law to be exercised. Finally, since a leasehold interest would be entitled to severance damages, under these circumstances to hold that Sec. 11 of the Illinois Eminent Domain Act does not provide that damages be awarded these petitioners would render such section unconstitutional, as a deprivation of property without due process. Petitioners respectfully iterate their prayer that a Writ of Certiorari issue to the Supreme Court of Illinois.

Respectfully submitted,

JOHN B. MURNIGHAN,
GREEN, MURNIGHAN & KANE ASSOCIATES,
228 North LaSalle Street,
ST 2-0293,
Chicago, Illinois 60601,
Attorney for Petitioners, National Bank of Albany Park in Chicago, as Trustee Under Trust No. 11-1030, Individually and as Successor in Interest to Exchange National Bank of Chicago as Trustee Under Trust No. 15166; and La Salle National Bank of Chicago, as Trustee Under Trust No. 35232, Successor in Interest to John Przywara and Josephine Przywara, His Wife.